TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 523.

THE TEXAS & PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

A. R. RIGSBY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED JUNE 21, 1915.

(24,806)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 30, 1915.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the First Monday in November, A. D. 1914, at Fort Worth, Texas, Before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Rhydon M. Call, District Judge.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,

versus

A. R. RIGSBY, Defendant in Error.

Be it remembered, that heretofore, to-wit, on the 17th day of April, A. D. 1914, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2638, as follows:

CAPTION

Be it remembered that at a term of the United States District Court in and for the Eastern District of Texas, holding sessions at Jefferson, Texas, at its October Term, A. D 1913, and on the .. day of October, 1913, in Cause No. 597, wherein A. R. Rigsby was plaintiff, and the Texas & Pacific Railway Company was defendant, a judgment was rendered in favor of A. R. Rigsby, the plaintiff, and against the Texas & Pacific Railway Company, for the sum of Eleven Thousand Five Hundred ($11,500.00) Dollars.

The following proceedings were had, to-wit:

TRANSCRIPT OF RECORD

United States
Circuit Court of Appeals
FIFTH CIRCUIT

PETITION

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS,
AT JEFFERSON, TEXAS.

A. R. RIGSBY

vs.

TEXAS & PACIFIC RAILWAY.

To the Honorable J. Gordon Russell, Judge of Said Court:

A. R. Rigsby, plaintiff herein leave of Court having first had and obtained files this amended original petition amend-

ing his original petition files in the District Court of Harrison County, Texas, prior to the removal of this case so that the same shall hereafter read as follows, to-wit:

1. A. R. Rigsby, plaintiff, complaining of the Texas & Pacific Railway, defendant, represents and shows that the plaintiff resides in Harrison County, Texas, and that the defendant is a body politic duly incorporated under the laws of the United States and is engaged in the business of a common carried by railroad in Harrison County, Texas, where it has agents upon whom process may be served in suits against said defendant.

I.

The plaintiff shows that heretofore to-wit, on or about the 4th day of September, 1912, he was engaged in the service of the said defendant as a switchman in its yards at Marshall, Texas, and had been so engaged prior thereto and that on or about said date, while in the necessary discharge of his duties as such switchman, the said plaintiff received severe and permanent personal injuries which were inflicted upon him by reason of the negligence of the Railway Company, its agents, servants and employes, as hereinafter more fully set out.

II.

The plaintiff shows that in the discharge of his duties as switchman he started to descend from the top of one of the cars being operated by the defendant in its said yard in Marshall, Texas, and that in so descending from the said car the plaintiff was using and attempting to use the ladder, and hand holds or grab irons prepared and furnished and attached to the said car by the said defendant for the use of its said employes in ascending to or descending from the said car and when the plaintiff stepped upon one of the grab irons or hand holds that the same gave way and caused plaintiff to fall from the said car to the ground, striking on his back, side and shoulder against the ground and other hard substances, which inflicted upon him severe and per-

manent injuries from which he will never recover; that the said defendant was negligent in not having the said hold or grab securely fastened to the said car, and that by reason of such negligence, the same gave way and threw the plaintiff to the ground and caused to be inflicted upon him the injuries herein sued for.

III.

The plaintiff shows that his shoulder and side were severely bruised and injured, and his ribs torn and broken and that his back and hip was severely wrenched, bruised and injured, and that the said injuries to the plaintiff's said hip and back and entire body are permanent in their character, and the plaintiff will never recover from the same. The plaintiff shows that by reason of the said injuries he has lost much time, and will continue to lose much time in the future; that he has suffered great mental and physical pain and will continue to so suffer so long as he may live; and that he will never be able to engage in any work by which he can earn money in the future.

IV.

The plaintiff shows that at the time he was injured he was a young man, strong and healthy, able to do much work and was able to earn by his labor the sum of towit, One Hundred and Ten Dollars per month and that since said injuries and by reason theerof, he has not been able to earn any money whatever and the plaintiff verily believes and here charges that by reason of said injuries, which are permanent in their nature and character, that the plaintiff will never be able to earn any more money in the future; that the plaintiff has been damaged in time lost, time that he will lose in the future, decreased ability to earn money in the future, mental and physical suffering endured and that will hereafter be endured in the sum of towit, Thirty Thousand Dollars actual damages.

V.

The plaintiff shows that at the time he was injured that the said defendant Railway Company, being a common car-

rier by railroad and engaged in interstate commerce in that it had a line of railroad running through the State of Texas and into the State of Louisiana over which it was constantly switching, hauling and handling passenger and freight cars being engaged in the regular business of a common carrier over said line of railroad between the said States of the Union. That the car from which plaintiff fell and was injured was being used upon the said line of railroad to-wit, the main line of railroad of the said defendant Texas & Pacific Railway Company, which runs between its passenger station in Marshall, Texas, and defendant's stations in Shreveport and New Orleans, Louisiana, and that the said car was being used on the said railroad so engaged in said interstate commerce at the time the plaintiff fell therefrom and was injured. The plaintiff shows that the said injury was caused by the said defendant Railway Company violating the laws of the United States and in particular the law known as the "Safety Appliance Laws or Acts" passed by the National Congress in 1893, and as amended in 1896, 1903 and 1910, all of which are here referred to and the plaintiff claims the right to recover damages for his said injuries so received by virtue of the rights accorded to him in the said "Safety Appliance Acts" of the said Congress.

The plaintiff shows that if he should be mistaken as to his right to recover damages against the said defendant by reason of his injury having been brought about and caused by the defendant Railway Company violating the said "National Safety Appliance Acts" referred to in preceding paragraph hereof, that then plaintiff claims the right to recover damages from said defendant Railway Co. under the laws of the State of Texas known as the "Safety Appliance Laws

VI.

of the State of Texas" as heretofore enacted by the Legislature of the State of Texas in 1909 and subsequent amendments thereof, and said plaintiff here alleges and shows that the injuries to the said plaintiff were caused by reason of the said defendant Railway Company while engaged in the

business of a common carried was using in said business in the State of Texas said car which was not provided with sufficient grab irons, hand holds, etc., as required by said law. That the said State law provides in effect that all cars being used by a common carried in intrastate traffic shall be provided with sufficient and secure grab irons, hand holds, and foot stirrups, and that said defendant violated said law and the provisions thereof by using said car which was not provided with sufficient and secure grab irons, hand holds, and foot stirrups and its failure to so provide the same therewith caused the said injuries to the plaintiff.

VII.

Wherefore the defendant having been cited and having answered herein, the plaintiff prays that upon final hearing of this cause plaintiff have judgment against the said defendant in the sum of thirty thousand dollars actual damages, all costs of suit and for general relief.

S. P. JONES AND BIBB & SCOTT,
Attorneys for Plaintiff.

I, A. R. Rigsby, plaintiff in the above cause, solemnly swear that the facts and statements contained in the foregoing petition are true according to my knowledge and belief.

.....

Subscribed and sworn to before me this.....day of October, 1913.

.....

Notory Public in and for Harrison County, Texas.

Endorsed. No. 597. A. R. Rigsby vs. Texas & Pacific Railway Company.

Plaintiff's Amended Original Petition. Filed Oct. 9, 1913. J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A copy of the original I certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

IN THE UNITED STATES DISTRICT COURT OF THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON, TEXAS.

ANSWER

A. R. RIGSBY

vs.

TEXAS & PACIFIC RAILWAY CO.

Now comes the Texas & Pacific Railway Company and amends its answer and says.

1.

Now comes the Texas & Pacific Railway Company and demurs to plaintiff's petition and says the same shows no cause of action.

2.

And for answer defendant denies each and every allegation in plaintiff's petition and says it is not guilty of the wrongs charged against it.

3.

Defendant says that the plaintiff Rigsby was employed as a switchman in the Texas & Pacific yards at Marshall, Texas, and his duty required him to handle and couple and uncouple cars that were placed in the yards at Marshall, that came under his jurisdiction. That some days prior to the time Rigsby was injured, several cars that were in bad order were brought to the yards at Marshall and placed therein for the purpose of being repaired in their regular turn, and while they were waiting to be repaired, they were placed on the usual and customary track for such bad order cars. That said car from which Rigsby fell was being conveyed to the shops for repairs and was marked in bad order in the usual and customary way to give notice to the employes, and Rigsby knew, or should have known, that this car was in bad order when he went to climb from it. That

the condition of said car being in bad order, was not the result of any negligence on the part of the Railroad Company, but said bad order resulted from the ordinary use and wear and tear of cars. That the plaintiff knew, or would have known if he had attended to his duties properly, that said car was not in good order, but was being handled as a bad order car and that as such he had no right to rely on it being in good condition. That the plaintiff was guilty of negligence which caused his injury and that the defendant was not guilty of any negligence which contributed to the injury to plaintiff.

The defendant further says that when said Rigsby undertook to climb from the car from which he fell, he knew or should have known by proper attention to his duty, the condition of said car, and that he was put on notice that the said car was not in good repair but was defecetive and out of repair, and the said Rigsby in attempting to go on to said car at the time and place he did, assumed the risk of being injured on account of the defects that were in said car at the time.

Wherefore he cannot recover.

F. H. PRENDERGAST,

YOUNG & STINCHCOMB,

Attorneys for Defendant.

Endorsed. D. L. No. 597. A. R. Rigsby vs. Texas & Pacific Railway. Answer Filed Oct. 9, 1913.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A copy of the original I certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

No. 597.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF TEXAS, JEFFERSON DIVISION.

A. R. RIGSBY

JUDGEMENT

D. L. 597. Vs.

TEXAS & PACIFIC RAILWAY COMPANY.

On this the 10th day of October A. D. 1913, came on to be heard the above numbered and entitled cause, and the plaintiff and defendant appeared in person and by their attorneys and announced ready for trial, and there came a jury of good and lawful men, towit-: H. P. McGaughy and eleven others who were duly empanelled, tested and sworn to try said cause and the trial of said cause continued from day to day and thereafter on the 14th day of October A. D. 1913, said jury after having heard the pleadings, evidence and arguments of counsel and after having received the charge of the Court returned into open Court their verdict, which was as follows, towit:

Jefferson, Texas, Oct. 14, 1913.

We the jury find for plaintiff and assess damages at Eleven Thousand Five Hundred ($11,500.00) Dollars.

H. P. McGAUGHY, Foreman.

It is therefore ordered, adjudged and decreed by the Court that the plaintiff A. R. Rigsby do have and recover of and from the defendant the Texas & Pacific Railway Company the sum of Eleven Thousand and Five Hundred ($11,500.00) Dollars with interest thereon from this date at the rate of 6 per cent per annum.

It is further ordered that plaintiff recover all costs in this behalf expended for all of which execution may issue.

It is further ordered that execution may issue against each party for all costs by them respectively incurred.

GORDON RUSSELL JUDGE

Endorsed. D. L. 597, A. R. Rigsby vs. Texas & Pacific Railway Co. Judgment filed Oct. 14, 1913.

J. R. BLADES, Clerk.
By W. E. SINGLETON, Deputy.

A copy of the original I certify.

J. R. BLADES, Clerk.
By W. E. SINGLETON, JR., Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF TEXAS,

AT JEFFERSON.

A. R. RIGSBY

No. 597. Vs.

THE TEXAS & PACIFIC RAILWAY COMPANY.

KNOW ALL MEN BY THESE PRESENTS, That we, THE TEXAS & PACIFIC RAILWAY COMPANY, a corporation duly incorporated and organized under and by virtue of an Act of Congress of the United States, as principal, and J. H. Ardrey and E. R. Buddy as sureties, are held and firmly bound unto A. R. Rigsby in the sum of Seventeen Thousand Dollars to be paid to the said A. R. Rigsby, his executors, administrators or assigns to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents, sealed with our seals, using scrolls for seals, and signed with our names, this the ..... day of January, 1914.

The condition of the foregoing bond is such, that, whereas, lately at a term of the District Court of the United States for the Eastern District of Texas, at Jefferson in a suit pending in said Court, between A. R. Rigsby, plaintiff, and The Texas & Pacific Railway Company, defendant, numbered 597 on the docket of said Court, a judgment was

rendered on the 14th day of October, 1913, that the plaintiff, A. R. Rigsby, should have and recover of the defendant the sum of Eleven Thousand and Five Hundred Dollars with six per cent per annum thereon from date of rendition, as well as all costs of suit; and,

Whereas, said The Texas & Pacific Railway Company has obtained a writ of error, and has filed a copy thereof in the office of the Clerk of said Court to reverse said judgment, and also a citation directed to said A. R. Rigsby and his attorney of record, S. P. Jones, citing and admonishing them to be and appear at the United States Circuit Court of Appeals, for the Fifth Circuit to be holden at New Orleans, Louisiana, within thirty days from the date hereof.

Now if the said The Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE TEXAS & PACIFIC RAILWAY CO. (Seal)

By F. H. PRENDERGAST, Attorney.

J. H. ARDREY. (Seal)

E. R. BUDDY. (Seal)

Approved:

GORDON RUSSELL, Judge.

Endorsed. D. L. No. 597, A. R. Rigsby vs. The Texas & Pacific Railway Company, in the United States District Court for the Eastern District of Texas at Jefferson. WRIT OR ERROR BOND, filed 20th day of February, 1914.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A copy of the original I certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A. R. RIGSBY

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY.

No. 597.

SUIT PENDING IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS.

TO THE HONORABLE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT:

GREETING:

Now comes the Texas & Pacific Railway Company and shows that in the proceedings had and in the judgment rendered in the above cause, error has been committed to the damage of the Texas & Pacific Railway Company, as shown by the following assignments of error:

1.

The Court erred in refusing special charge No. 1 requested by the defendant as follows:

"The Jury are charged:

In this case it appears from the evidence that the plaintiff Rigsby was employed by the Railway Company to work as a switchman in the yards at Marshall, Texas, and under his employment his duty required him to handle cars that were in bad order, brought to the yard to be placed in the shops to be repaired. And it appears that the car from which he fell was marked with a tag showing it was in bad order, and was to be placed in the shops there for repairs, and that at the time Rigsby was injured the car was being taken from the yard to shops to be repaired. These facts do not show the defendant to be guilty of any negligence.

2.

The Court erred in refusing special charge No. 2 requested by the defendant as follows:

"The Jury are charged:

That in operating a Railroad it is unavoidable that cars will get defective and out of repair, and that it is necessary that these bad order cars should be conveyed from the yard to the shops to be there repaired. Therefore it would not be negligence for the Railway Company to place on certain employes the duty of so handling such bad order cars, and if the employe knows that it is his duty to handle such cars, he can not recover from an injury received in handling bad orders cars.

3.

The Court erred in refusing special charge No. 3 requested by the defendant as follows:

"The Jury are charged:

That the evidence shows that plaintiff was injured while handling a car that was in bad order and out of repair. There is no evidence that the condition of said car, resulted from any negligence of defendant and it is not made to appear that the Railway Company could by the exercise of ordinary care dispensed with the handling of said bad order car, therefore you can not find the Railroad Company negligent in handling the car when it did.

4.

The Court erred in refusing special charge No. 4 requested by the defendant as follows:

"The Jury are charged:

If you find it was customary in the Railroad yard at Marshall to tag cars that were in bad order with a tag showing that fact and that such tag meant that the car should be taken to the shops for repairs, and that the car from

which plaintiff fell was so tagged, then this was sufficient to give notice to the plaintiff that said car was out of repair.

And in such case the plaintiff can not recover.

5.

The Court erred in charging the jury peremtorily to find a verdict for the plaintiff as follows:

"The Court instructs you as a matter of law that it will be your duty under the facts proveen in this case to return a verdict in favor of the plaintiff, and the only question the Court submits to you is the measure of damages."

Wherefore, the Texas & Pacific prays that a writ of error be granted it to remove this cause to the United States Circuit Court of Appeals, that the errors may be therein corrected. It further prays for a reversal of judgment rendered, and prays the Court to fix the amount of supercedeas bond to be given by the defendant in this cause.

F. H. PRENDERGAST,

Attorney for Texas & Pacific Railway Co.

Writ of error allowed and supercedeas bond fixed at $17,000.00. GORDON RUSSELL,

Judge.

Endorsed. D. L. No. 597, A. R. Rigsby vs. The Texas & Pacific Railway Co., Assignment of Error. Filed Feb. 20, 1914. J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

A copy of the original I certify.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS,
AT JEFFERSON.

A. R. RIGSBY

No. 597. Vs.

TEXAS & PACIFIC RAILWAY CO.

BILL OF EXCEPTIONS.

On the trial of the above entitled and numbered cause, in the District Court of the United States for the Eastern District of Texas, at Jefferson, on October 13 and 14, 1913, the following evidence was introduced, procedings had and exceptions reserved, to-wit:

A. R. RIGSBY, THE PLAINTIFF, TESTIFIED:

I live at Marshall, Texas, and have lived there about 12 years. I worked for the defendant at Marshall three years and a half the last time, but had been with it before. I am 49 years of age, and have been railroading since 1884; I was about 21 years of age when I started railroading. For the last two or three years of my service with the defendant at Marshall I was engaged as a switchman in the yards there. My wages were $3.50 per day and I averaged about $105.00 per month. At Marshall there were three switching crews in the day time and one at night. I was in a day crew, and the crew was made up of four men, the foreman and three helpers or switchmen. The crew I was with was required to place cars in the car shops and take them out, and to do other necessary work around the shops, and to place cars to be loaded and unloaded, switch cars in and out of the bridge yard, to and from the oil mill and lumber yard and the coal chute. My crew was not required to break up trains. My crew was known as the "scrap crew" or the "scrap yard crew." That yard is in the extreme eastern end of the yard at Marshall. We had to do with the setting and throwing

of switches at different places, and also the coupling and uncoupling of cars, and we were also required to climb to the tops of cars and set the brakes and obey the signals. We did all the service of moving cars in that portion of the yards where we worked. We were kept pretty constantly busy during the time we were on duty—that is, from seven to twelve and from one to six in the evening. I received certain injuries while working for the defendant. I was hurt on September 12th. In coming down from the top of a box car a grab-iron gave way with me, which caused me to fall back on some switch ties piled up near the track. The height of an ordinary box car is about 14 feet from the ground to the top of the car. There is a ladder on either side of a box car provided for switchmen to go to the tops of cars and come down from the tops to the ground. This ladder consist of grab-irons or hand-holds bolted to the side of the car, and on this ladder the switchman climb straight up from the ground to the top of the car and come from the top to the ground. The yard where I worked was so situated that a switchman could not move rapidly; he had to take his time out there. Lots of times we have to hurry up and down the sides of the cars for the purpose of setting the barkes and stopping the car at the point where it is desired to be stopped, and at this place where I was injured there is a grade—that is to say, it is on a hill side. The car from which I fell was on the main line. It had been switched from the middle of the load to the main line. I was on top of the string of cars in which the car from which I fell was situated when it came from the lead out on the main line. We had to switch some of the cars from the lead out on to the main line for some purpose, the foreman did not tell me what. I let the cars run as far as they would go up the main line and then set the brakes. It was up hill there and I had to set the brakes to keep the cars from running back east. I set the brake and started to climb down from the top of the car. I was coming down to go on another track to cut some more cars. The engine came back on the other track. It was my duty to go over there and cut some more

cars. I started from the top oft he car down the side of the car and the grab-iron was missing. The grab-iron that was missing was the one under my foot. I don't know how far it was from the top of the car to the missing grab-iron, but I still had hold of the grab-iron on top of the car when the one under my foot gave way with me. It could not have been any other than the third grab-iron from the top. I suppose the portion of my body from the waist of my pants upward was above the roof of the car when I started to fall. I put my weight on one of the irons below the top of the car and it gave way with me, and that let me fall back and hit the ties and ground. The weight of my body broke my hold loose from the hand-hold on top of the car; when I started down I tried to hold on but could not. My back and right hip struck the ties and ground; I was pretty badly hurt and rendered unconscious for quite awhile. I have no idea how long it was before I regained consciousness. When I regained consciousness they had me on a cot and had started home with me. That is when I first came to myself. I asked those who were carrying me on the cot to let me down so I could rest. I was then lying on the cot. I think it was about the shanty that I asked them to let me rest. They took me on home. I made no effort to get up and walk because I could not. I knew I could not walk; I did not even know when they put me on the cot. I suffered with pain in the back and hip. I was not taken to the hospital but was taken to my home. Harry Robertson called Dr. Moore to see me, Dr. Moore is the chief surgeon of the defendant, and has charge of its hospital at Marshall. He came to see me and gave me two or three hypodermics of medicine to ease my pain. Dr. Moore came to see me twice a day for nine days, and after that he came about once a day for about a week, and after that for the balance of time he made his trips two or three or four days apart. I was confined to my bed for five weeks. When I got out Dr. Moore brought me some crutches and I used them in getting about. I was on two crutches something near a month. I then used one crutch for awhile and after that I could use a cane some. I have

never since my injury been able to get about without support of some kind. Around the house where the surface on which I walk is level and smooth, I can get around with a cane. I can not stand to carry my weight on my foot. Where the surface is rough I can not walk with a cane; I can not stand it. I have to hold the weight off my hip and my arm gives out in using a cane. With a crutch I get the support from my shoulder. I can support myself much better with a crutch than with a cane. I was injured the 14th of September, 1912. After Dr. Moore quit treating me I tried Dr. Carwile, and I would go to him ever once in awhile until lately. I quit using two crutches about November, and have used one crutch since that time. In the house on the level floor I can get around with a cane. There has been no improvement in my ability to handle myself and get around for the past six or eight months; my condition in that respect has remained about the same. The map which you exhibit to me is a very fair representation of the yard in the neighborhood of where I was injured. On the map you show me is a track that leads off from the main line on a southwestrly direction, and there are some tracks leading off from that lead practically west, and the one nearest to the ice plant is called the mill yard spur. Beginning at the main line north, the tracks south are, first, the bridge yard lead, and it is the track that goes up there to take bridge material into the bridge yard; the cars go there to load and unload company material. The next one is a spur track and called the piling track, and they keep all kinds of cars in there, boarding cars, and piling is put in there to be unloaded. The next one to the south is the main mill yard spur, and they unload piling and stuff of that kind in there, and it is the place for loading and unloading telegraph poles. There are other tracks that lead off further west, and they are used to load and unload bridge material. There is a track there that is used to go to the upper yard and oil mill further west, and then there is where they go to the ice plant during the fruit season when they are icing cars or anything like that. The string of cars the engine took hold

of and started to move to the main line were between the points A and B on the map. The engine took hold of the cars and took them out on the main line and set them in on the main line. When I fell from the car it was about at point C on the main line. I fell from the car on the south side of the main line at the place marked X on the map, and the place indicated on the map for the pile of switch ties is where I fell. In the performance of my duties I would have occasion to go on the mill yard lead during the oil mill season as often as three or four times a day, and at other times perhaps two or three times a day, and sometimes we might not go in there for several days. I hardly believe we would miss more than two days going in there at any time except during the summer season. In handling cars there in the yard it was necessary to go to the tops of them and use the ladders in setting the brakes to hold the cars when they were stopped; it is down hill going east there. During the time I was in bed I suffered quite a great deal. I was in pain all the time and for about three weeks I could not turn over in bed. I have suffered all the time since I was injured, and my suffering now seems to be in my back and spine. Dr. Rogers Cocke also treated me. I went to the doctors because I thought they could do away with the pain that I had in my back, ease me. I went to them for the purpose of being treated and trying to get well. When I fell from the car it was on the main line of defendant's railroad. This main line runs from the passenger depot in Marshall to New Orleans, La.

CROSS EXAMINATION:

Of the various tracks shown on the map the mill yard lead is the principal one. That is used to go to Sam Burnett's lumber yard and to the oil mill. All the other tracks off to the south of the main line were used to handle company stuff—that is, the three tracks between the main line and the mill yard lead. The main line was used for trains that passed through the yard. The first track south of the main line is called the bridge yard lead, and it goes in there

to load and unload company material. The second track south of the main line is a little spur that is used to put camping outfits on and they put piling on it. It is used for company purposes. The third track south of the main line is called the mill yard lead, and it is also used for storing company material. They unload telegraph poles there for the Western Union,, and there is a little house on the south side of the track where they stop cars to put ice in them. They put ice on the platform and then they have conveyors that carry the ice into the cars. There is a platform there and a little house. I do not know how many cars we were after down there that morning. The foreman hardly ever told me. The man that followed the engine was generally the only man he would tell. The man who followed the engine on this occasion was Charley Terry, and he got his instructions from the foerman, Jack Kelly. Kelly told Terry where to take the engine to. We went in on the mill yard lead and coupled up and pulled out 10 or 12 cars, may be not more than 10, I don't remember. The engine hitched to the east end of those cars. We switched three of those cars on the main line and I don't know what he did with the balance. The three I was on were hitched together. I think I was on the middle of the three cars, I am not sure. That was the first switching we had done and this thing happened about 7:20 a. m. That was the first work we did on that lead that morning. I understand the cars were going back there for some purpose. I understood the engine was going back with other cars on the lead, but did not know how many. He said they wanted to get some cars out and there were two or three switches to be made. They would have to go in there about three times. I was on the third car at the west end of the 10 cars. They cut three cars off and I set the brake and started down the side of the car and fell. That would leave seven cars ahead of the engine. I understood that some of them were going back on the lead and some were not. I did not know which ones were going back on the lead. I have never been up town without my crutch. Dr. Carwile had not seen me before Dr. Moore reached me.

He had been to my house before that to see some of the children; he was our family physician. He did not come to see me for Dr. Moore. I went to the office of Dr. Carwile, and he gave me internal medicine for my pain and gave me some liniment. No, I don't believe he gave me liniment, just internal medicine for pain. I don't know what kind of medicine he gave me. Dr. Moore treated me five weeks. The last few visits were three or four days apart. I don't know just when Dr. Carwile commenced to treat me, but I know it was but a short while after Dr. Moore discontinued his treatment that I went to Dr. Carwile for medicine to relieve my pain. I was confined to my bed five weeks and was on crutches about four weeks, which would make nine weeks and that would put it about the middle of November. I then got out on one crutch. I don't remember just when I went to see Dr. Carwile, whether before or after I commenced using one crutch. I think it was last March that Dr. Cocke commenced treating me. Dr. Carwile continued to treat me in connection with Dr. Cocke. Dr. Cocke gave me electrical treatment. He didn't visit me at my home. I can not say that I improved any under the treatment of Dr. Cocke. It would ease the pain for a time, but the relief would only last a little while and come back again. Dr. Cocke treated me from last March up to the time I came to court last week. He would treat me once or twice or three times a week. Dr. Carwile treated me all along until 10 or 12 days ago. Dr. Carwile has given me medicine and Dr. Cock has given me electrical treatment. The company does not repair bad order cars out on the tracks at Marshall, except they have a track called a rip track that they do light repairs on. Part of it has a shed over it. There is another engine besides the one I worked with that took cars to the rip track. Some of the bad order cars were stored in my end of the yard. The track where we pulled cars every morning was called the receiving track. The lead engine would put the cars in there. They would sometimes scatter bad order cars all over the yard put, them wherever they could get them. They did not have a certain place to

put them. They did not store cars on the main line permanently. We have to take the cars off the receiving track. We put bad order cars first on one track and then another. Some of them are taken to the car shops and placed in the car shops. They would make a requisition for cars to go in the shops. Mr. Jarboe, the shop man, would designate the cars he wanted in the shop. Sometimes he would want a certain class of cars, and at other times another class of cars, for instance, one time 80 thousand capacity cars or 60 thousand capacity cars, and at other times he would want flat cars. If he wanted so many flat cars, he would make requisition for them, and if he wanted so many 80 thousand capacity cars, he would make requisition for those, and we would have to handle what he wanted by switching them out and taking them up there. I stated that we had to move slowly in the yards, and then I stated that we had to move fast at times. Around the car shops we have to take it slow and easy to keep from killing anybody, and you can work faster in the yards than around the car shops. We work by the hour so many hours a day and never get through by night. We just work so many hours and quit until the next day. There is nothing requiring us to work fast so as to make it dangerous, but lots of times a man has to be in a hurry whether it is dangerous or not. We have to hurry to cut off a car sometimes. I was not in a hurry in climbing down when I was injured. The car from which I fell was standing still. There was a car going back into the mill yard lead that I had to look out for. The other man was east of me, but I don't know what he was doing. Terry was east of me on the ground, and Robertson was also up there on the ground. Kelly never told me what they were going to do with the cars they were cutting out. They never told me they had a requisition from Jarboe to put some cars in the shops, and I did not know that was the work we were doing. He said he wanted to pull the track and I climbed up there. Jack Kelly, the foreman uncoupled the cars. Terry followed the engine, and Kelly cut the cars off, and cut off the three cars that I rode in there where I was hurt. I

don't know where Robertson was when the cars were cut off. When Kelly cut off the three cars Robertson was up on the bridge lead; he was about thirty feet from me I guess. Robertson might have seen me up in the yard. Kelly might have sent Robertson to look for something. He did not go up in the mill yard lead with us, but Kelly did. Kelly walked along up the north side of the cars and I climbed on the north side of them and walked back over them to let the brakes off. My back bone hurts me all the time. I don't know whether it is broken or not. I don't suppose the injury to my back is visible so it can be seen. It seems to be in my back bone. It is not on the outside. It was visible for along time. Dr. Carwile and Dr. Cocke examined me week before last. They examined me together in Dr. Cocke's office.

RE-DIRECT EXAMINATION:

I went up on the cars on the north side and started down on the south side. We pulled the receiving track that morning. They put cars in there at night and we pull them the next morning, and lots of times that track will be filled in the day time. Jarboe would make request or requisition for bad order cars to be brought to the shop, and the requisition would be brought to the foreman of the engine, Mr. Kelly, in this instance. Jarboe would not request the cars from me. Heavy repairs are done at the shops; the cars are rebuilt and worked over there. The kind of cars requisitioned by Mr. Jarboe would depend on the material they had on hand and the car most needed. Brakemen and switchmen would not use cars with bad hand-holds if they knew it. The defendant has inspectors in the yards to look out for bad order cars; they go over a string of cars to see if there is anything the matter with them, and if they find a car with a loose hand-hold or anything the matter with it that makes it necessary to fix it, they mark it "BO Rip Track," and if they want it to go to the shop, they put a red card on it that says "Bad Order." If they find a hand-hold bad the car is taken to the rip track and fixed. The in-

spectors and car repairers were supposed to keep the cars up and the switchmen were not supposed to examine the cars; we never looked for anything like that. We were supposed to take cars to the car shop regardless of what was was the matter with them. I was on the car for the purpose of setting the brake to keep it from rolling back down the hill. The cars were standing still. They kicked them up and I rode them as far as they would go and as soon as they stopped I set the brake. The foreman did not tell me what they were moving the car for and I did not know. The foreman has told me since that he was going to take the cars to the shop, but I did not know at that time. He said he was going to take them to the car shops for repairs. I did not know at that time whether the car from which I fell was marked bad order. I never had seen the car before I went on top of it. The receiving track was for receiving bad order cars as well as other cars. My engine had jurisdiction over the east end of the yards.

RE-CROSS EXAMINATION:

Cars loaded with freight to go to New Orleans would not be put on the receiving track there. Only cars to be handled by the east end engine were put on the receiving track. The receiving track ran clear through the yard. They put a red card on cars to go to the shops with the words "Bad Order" on it. There would be nothing put on the car to indicate the nature of the defect. It merely said "Bad Order. Shop," or something like that. There was nothing else on it.

DR. H. R. CARWILE TESTIFIED FOR PLAINTIFF:

I live at Marshall and have lived there about 14 years. Am engaged in the practice of medicine and surgery and have been so engaged about 20 years. Know the plaintiff, and was his family physician both before and after he got hurt. I know in a general way of the circumstance of his getting hurt. I was afterwards called on to treat him. That was some six or eight months ago, but I could not state the

date. My recollection is that the first time I prescribed for plaintiff I was down at his residence to see some member of his family, and he asked me to prescribe something for his suffering. At that time I did not make an examination of him, but merely prescribed for his pain and suffering from what he told me, the symptoms he gave me. I have continued to treat him at intervals since that time. I have made an examination of his person. I found an area of anaesthesia over his right hip, and some thickening of the rim of the pelvic bone above the right hip, and a total loss of both patella reflexes. At times he has had temperature. I don't recollect whether he had temperature at that time or not. He complained of pain and suffering in the back and right leg, and that has kept up until the last time I saw him. I examined him ten or twelve days ago in connection with Dr. Cocke. His condition then was practically the same as it was four or five months ago. The anaesthesia was largely over the right hip, and in the region of the back over the right hip. Anaesthesia is a loss of sensation, making the place insensible to pain from pin pricks and things of that kind. There is a thickening of the rim of the bone that comes around above the hip, the pelvic bone, and that indicates that there has been some fracture there. That would affect the nerve supply there and interfere with his walking, I think. The anaesthesia is an indication of some paralysis of the nerves that supply that portion of the body. Pressure on the nerve as it comes out of the spinal column would certainly destroy the use and function of the nerve or the part the nerves go to. There are a lot of nerves that come out between the joints of the spinal column that furnish feeling and motion to the parts of the body those nerves supply; and I mean to say that there is a paralysis of the nerves supplying the anaesthetic region. In my opinion, the fact that there is a loss of feeling in that region indicates that the nerve supplying it has been paralyzed. When I say temperature I mean that the plaintiff had fever. The fever may have been due to la grippe or something of that kind. I don't think it was traceable to the injury at all.

There is an entire absence of knee jerk. The reflex in the knee is indicated by a jumping of the lower part of the leg when there is a stroke near the knee. If the spine and nerves are in good condition all the way down, we expect to get an involuntary kick from the striking of the knee. It is involuntary and can not be similated. That absence of the reflex indicates that there is some partial paralysis of the spine. That condition of absence of the reflex being present 13 months after the injury to the back would make the prognosis unfavorable. I do not look for him to get well. From my examination and treatment of the plaintiff, I do not believe he will ever be able to do first class manual labor. Taking the length of time and the conditions and everything, I do not believe he will ever be able to do hard labor again.

CROSS EXAMINATION:

It was something like two or three months or longer after the plaintiff was injured that I first saw him. I never saw him at any time with a fever that I thought was produced by the injury; it was three or four months after the injury that he had the fever. I understand the fevar was the result of la grippe or some affection of that kind. During the time I was treating him I made an examination of his back bone but did not the first time I saw him. The back bone is known as the spinal column, and the spinal cord is on the inside of the back bone. The back bone is in sections and joined together by cartilages and ligaments. The bones are thick for the purpose of giving protection to the spinal cord and supporting the body, and there are cushions between the various sections of the back bone supposed to take the shock off the cord. I examined the place on his back where it is claimed his back struck. There was no discernable injury to the back at the time I examined him; I could feel no evidence of injury there. There was some thickening of the rim of the pelvis. The pelvis is the bone at the top of the hips, and it connects with the back bone at the small of the back. I would call the injury to the pelvis a

fracture and not a contusion. I do not know which way the fracture went, and just know there was a thickening on the top of the bone, showing repair to be in process there. It had repaired and left thickening there. Plaintiff has good use of his left leg now. He can move his right leg about. There is no loss of motion in the right leg that I know of. He claims it pains him to use his right leg. I understand that he can put his right leg to any motion he could if it was not injured. The only thing that is present is the pain. There is no injury to his ankles that I know of, and he don't claim any. He claims no injury to his knees or thighs. I said there is an absence of the reflexes of the knees. I do not find the reflexes in either the right or left knee. I did not find evidence of injury to the left leg or any affect in the left leg to cause an absence of the reflex. As far as the movement and manipulation of the left leg is concerned, I found no reason for detriment to it. The absence of reflex was in both legs. I have heard of a few cases where there was an absence of reflex in the knees of persons in health and who had never received an injury. I have never found an absence of reflex in a healthy person. Dr. Wheat of Marshall has no reflex, and I have understood that Dr. Smith of Texarkana has none. I see no connection between the injury to the back side of the pelvis and the loss of reflex in the left knee, except that an injury to the pelvis would be close to the spinal column and an injury there would naturally suggest an injury to the spinal cord. If you have an injury to the spinal cord, it is usually attended with some evidence of paralysis. I fould no evidence of injury to his left leg except the loss of reflex. From manipulation of the leg I found no evidence of paralysis. He could manipulate and use either leg, if it were not for the pain in the right one. He suffers pain in the manipulation of the right leg, but does not suffer any in the manipulation of the left one. The usual tendency of the human system is to repair injuries. The circulation of the blood through the body is the sanitary power of the body that removes troubles. If one has a bruise on the body the circulation of the blood

absorbs and removes it if it can be repaired. I found no bruises on the plaintiff's back or over his pelvis at the time I examined him. If there had been anything of that kind, it had disappeared. I found no evidence of a rupture of the skin or anything of the kind. A contusion of the bone would be some injury to the bone. In a bone felon the trouble is between the covering of the bone and the bone proper and it has to come to the surface and work itself out. There are some contusions that can work out by the circulation of the blood and the general repair of the body without having to come to the surface. I found no evidence on the plaintiff that he had had any eruption or abscess or anything of that kind. It is a general rule in a healthy man that when he receives an injury the general tendency of nature is to repair that injury. When it fails to repair that is the exception. Ordinarily the more considerable the injury, the more considerable time it takes nature to repair it. You can withdraw some portions of the body from use, and the tendency will be for it to lose its functions to some extent, and if he uses it and continues to use it, the functions will be restored. Mr. Rigsby has the power to move both legs the same as before but he claims that movement of the right leg is attended with pain.

RE-DIRECT EXAMINATION:

This thickening of the pelvic bone is right next to the spinal column. It would be an inch from the center of the back bone. The injury has repaired as far as the break is concerned. It indicates that there was a break and that it has repaired and left a thickened condition there. That might further indicate an injury to the spinal column. The presence of an anaesthetic condition in that region would indicate an injury to the spinal column. The fact that there is no knee jerk is an additional evidence of an injury there. Taken as a whole, it is my opinion that there was an injury to the spinal column; that is my opinion. It is true that the brain is at the upper end of the spinal cord, and motion is supposed to originate in the brain and be trans-

mitted through the cord to the extremities below the neck. At each joint in the spine a portion of the cord radiates off in the shape of nerves that go out and supply the body, some being sensory nerves or nerves of feeling and some motor nerves or nevres of motion. That continues all the way down to the end of the column. An injury to the cord or any of the nerves that comes out from the cord will have the effect of paralyzing or destroying the motion and sensation in the portion of the body fed by those nerves. The extent of the injury to the parts would depend on the extent of the injury to the nerve. It may be severe enough to cause total paralysis or it may produce only a partial paralysis. It is the rule for repair to be progressive until nature completes her work or quits the repair. If the process of repair quits for four or five months, I would think that would indicate the permanency of the injury, and that nature had done what it would do. I have known of bones being broken and no union of the parts made and nothing but a cartilage formed to hold it together, and a thickening form there. Such things do happen, and there will be no suppuration to the surface at all. It is the exception to the rule for a broken bone to suppurate unless the parts of the broken bone come through the skin. It is not usual for the evidence of a broken bone to come to the surface.

RE-CROSS EXAMINATION:

It is usual for a broken bone to knit. It is rarely the case that one does not. The percentage of bones that knit would be considerable against those that do not. The thickening of the top of the pelvis showed there had been repair. Where a bone has been broken and knitted together there is a callous thrown out around the broken place. That is for the purpose of holding the bones together until nature can complete her work. If a bone has been fractured and there is a callous around it, that shows it is in the process of repair.

RE-DIRECT EXAMINATION:

The patella reflex is more pronounced in some people

than others, but they are nearly the same. There is no way to make a measurement of what the kick has to be to be normal. I don't know that the normal kick has ever been measured in inches. It is left to the judgment of the physician as to just how much it should be.

DR. ROGERS COCKE TESTIFIED FOR PLAINTIFF:

Live at Marshall and am a practicing physician and surgeon. Have been engaged in the practice since 1899. I had several years experience in the Texas & Pacific Hospital at Marshall. I am City Physician of Marshall. I know the plaintiff and have examined him. I first treated the plaintiff on the 11th of March, 1913. I got a history of his injury at that time. I made a physical examination of him at that time and afterwards. Plaintiff came to me on account of the pain he was suffering. I found him suffering with pain in his hip and back, and on examination I found an enlargement of the right ilium, that is, the pelvic bone. I found the enlargement about as located by Dr. Carwile in his testimony on the stand. I also found an anaesthetic condition over the right hip and an absence of the petulla reflex. By anaesthesia I mean a loss of sensation. It is a partial loss. He does not feel the pin prick, except that he knows he is being touched. He can not tell whether you touch him with a pin or your finger. When you strike the tendon indiletaoin near the knee in a normal man there is a jerk of the foot, and that is the reflex. That absence of the reflex indicates some trouble in the spine or the nerves leading off from the spinal cord. Some interference with nerve function, the function of the nerve that supplies the part, is what I mean. An injury to the ilium would likely produce some trouble with the nerve supply it being close to the back bone. Plaintiff has visited my office for treatment since I first saw him in March, 1913, twice a week. His trouble has been practically stationary since I started to treat him. He still complains of pain in his hip and the small of his back with tenderness in those regions on pressure. Taking the history of the case and the condition in which I find the plaintiff

this length of time from the date of the injury, I think his injuries are probably permanent. I do not believe he will ever be able to engage in heavy manual labor again. Do not believe he will be able to do switching and such things as that. I have given the plaintiff electrical treatment with an electric battery for relief of pain. That has a tendency to stimulate the muscles and give him relief temporarily.

CROSS EXAMINATION:

Plaintiff's left leg has all the power of manipulation it ever had, and but for the pain, he can do anything with his right leg he ever could for certain purposes. There might be some slight limitation of motion in the right leg, but it would be very slight. From my investigations, I do not know of anything he could ever do with his right leg that he can not do now, and the only trouble would be that it would pain him to do some things. Possibly if he made up his mind to overcome the pain, he could do anything with his right leg that he ever could do. There is no injury to the back that can be seen at the present time. If there was any injury to the spinal cord from the fall on the back, it is not visible at this time. His back does not show a place of injury at this time. The only thing I can tell is that on pressure he flinches from pain. I can feel an enlargement of the bone of the pelvis. That was once a callous that the bone threw out, and it is probably bone by this time. When a bone is broken it throws out a callous for the purpose of repair and that makes an enlargement. The throwing out of the callous is supposed to be beneficial to repair. The only way I know about the tenderness is that when I press on him it brings forth an expression of pain. If I had him undressed in front of me there would be nothing that I could see which would show an injury. The reflexes vary in different normal persons. I have heard of some persons in apparently normal condition who had no reflexes at all. This enlargement of the pelvic bone was not in any joint, but was at a stationary place on the pelvis. It was right over the scroilic joint. It was to the right of the back bone.

The object of the pelvis is to hold the abdominal visery down. It does not move any muscles. Where the pelvis joins the sacrum there is a joint, but it has practically no motion. The enlargement was to the right of that joint, but the joint does not work any to speak of.

RE-DIRECT EXAMINATION:

The anaesthesia or loss of sensation would indicate that there was an injury to the spine or the nerve emerging from the spine. Taken in conjunction with that the pain he suffers, the loss of sensation would be an additional indication of injury to the nerves at the juncture with the spine or near by. The loss of the reflexes together with the other symptoms would indicate that the spine had been injured to some extent. At the present time the plaintiff is not able to use his right leg in walking because of the pain in his hip and back. The pain is so severe that he can not do it. The evidence of injury on the surface would probably disappear in a few weeks.

RE-CROSS EXAMINATION:

The plaintiff claims to suffer pain in the small of his back and to the right of spine about over the injured bone leading out towards his hip.The anaesthesia is to the skin, and frequently does not go beneath the skin. It is sometimes complete and then it goes beneath the skin. Plaintiff has pain on deep pressure over the anaesthetic area. My impression is that the pain is principally in the small of the back and in his hip. I am governed by what he says about that to a great extent. Taking the history of this case, I believe the loss of the patella reflex is attributable to paralysis. I find no trouble with the left leg. Frequently the only evidence of a spinal injury is a loss of the patella reflex. It would be unusual for an injury to produce a loss of the reflexes and nothing else. The only sign I saw of trouble to the left leg was a loss of the reflex. You could have pain and paralysis at the same time. A completely paralyzed man would not suffer pain. If he had a complete

paralysis of the right leg, he would not have pain in it at all. Where there is only a partial paralysis, there is oftentimes pain. Where the nerve is paralyzed, the paralysis deadens the sensation of pain in the region of that nerve, but frequently all the nerves are not paralyzed. The more complete the injury to the nerves the more complete the paralysis and the less pain. As the paralysis increases the pain decreases. I applied a foratic battery current to the plaintiff's back and hip, and I think I put strips on his back at his own request. Palliative electric treatment is all I gave him. I do not give all my patients electrical treatment.

RE-DIRECT EXAMINATION:

If a bone is broken the body usually has the capacity to repair it. The process of repair is generally a continuous process. It does not start, then stop and start again; it is usually progressive and continuous. Whatever nature is going to do, it does constantly until the job is finished. When nature stops the process of repair for four or five months, that indicates that nature has done all it can.

RE-CROSS EXAMINATION:

Usually the process of repair is accompanied with pain. Perhaps when the pain stops the effort to repair the bone lessens. When nature ceases to repair at all, the pain does not necessarily cease. I think in this case the injury to the pelvic bone causes the pain. I think that pain has been present right along. There may be some diminution of the enlargement of the pelvic bone in time, but I don't know that that would cause pain. I have to the best of my ability made an examination to ascertain where the pain comes from. I think it comes from the fracture of the pelvic bone. It seems to me that the break of the pelvic bone was transverse, but I never did find for sure which way it fractured. I think the break was four or five inches long, but the bone is buried so deeply it is hard to tell. This could be ascertained by the X-Ray, but I did not resort to that way of determining. The break involved the rim of the pel-

vis. I think the original shape of the bone is maintained. There was no portion of the pelvic removed or misplaced by reason of the fracture. There is nothing that creates a drawing or pressure on the pelvis. The weight of the body rests on the pelvis and then on the hip bone. The top part of the pelvis has nothing resting on it, and at the place of the injury it has nothing resting on it. The nerves do not come through the pelvis but come from the spine of course.

RE-DIRECT EXAMINATION:

All the nerves below the neck come from the spinal column. If there is an injury to a nerve that supplied the power of sensation, there is a loss of sensation, and if the injury is to a nerve that furnishes locomotion, it impairs locomotion.

Re-CROSS EXAMINATION:

The sensory nerves were injured in this case. As far as I could tell, the motor nerves were not injured.

H. B. ROBINSON TESTIFIED BY DEPOSITION FOR PLAINTIFF:

Am 31 years of age, reside at Marshall and lived there in September, 1912. Am unable to attend court on account of an injury I received in October, 1912. At the time of the injury to plaintiff I was working in the same switching crew with him, and was standing on the main line about 30 feet from the car from which he fell. He started to climb from the top of the car and he fell. Saw him fall. He fell backwards from the top edge of the car. The second hand-hold from the top of the car gave way. He put his feet on same and it pulled out, and he fell almost flat on his back. His hip and legs struck the ground, and part of his back and his head struck on a pile of ties, and I thought it had killed him. The car from which he fell was a T. & P. car, but I don't remember the number. The hand-hold that gave way was a part of the ladder upon which plaintiff was descending from the car. The car was taken from the oil mill lead that

morning. The oil mill lead is a track leading to the oil mill and other industries, lumber yard, icing plant, etc. Other tracks are located near the oil mill lead, and in order for the switch engine to get cars on and off those tracks they have to go on the oil mill lead. I could not say the number of times per day or week the engine would go on the oil mill lead at the place where plaintiff fell, but at that time of the year it was frequently. The defendant has car inspectors in the yard at Marshall, but I do not know how many. There were no car inspectors or repairers in the part of the yard where plaintiff was injured. The cars are repaired on the Rip Track by the repairers. It is not customary in the yards to use cars out of order. A car with a bad order tag on it, would be taken to be for general repairs and not for light repairs, such as hand-holds, grab-irons, etc. The portions of a car to be handled by switchmen such as hand-holds, grab-irons, etc., are supposed to be placed in a sound and safe condition before being handled by the switchmen. The sketch which is attached at the end of my testimony is a good representation of the yards at Marshall near where the injury occurred, and I have marked with the letter A the point from which the car was taken when the engine was first attached, and with the letter B the point where the plaintiff fell. It would have taken a car inspector or repairer about five minutes to have repaired the defective hand-hold which caused plaintiff's fall. He would have had to screw a nut on the bolt that held the hand-hold.

CROSS EXAMINATION:

On September 4, 1912, I had been working for the defendant in the yards at Marshall about a year and a half and for the defendant altogether about three years and a half. Have not worked for the defendant since October 1, 1912. Just before plaintiff was hurt, he was switching a cut of bad order cars from the oil mill lead to the main line, and he rode this cut of cars up the main line, and when the cars stopped he started down the side of a bad order car and fell therefrom. On September 4, 1912, I made a written

statement about the matter, and in answer to the question as to how the accident occurred, I said: "While switching a cut of bad order cars from the oil mill lead to main line A. R. Rigsby rode the cut up main line, stopped the cars and started down side ladder of T. & P. Car No. 11,932, second or third hand-hold from top gave way, causing him to fall on a pile of ties," and on September 7, 1912, I made a statement in which I said: "In regard to the attached papers, beg to advise that the cars we were handling on the morning of September 4, 1912, was bad order cars for Marshall shops." There was no specified track for bad order cars in the East End of the yard where plaintiff was injured. The car from which he fell was a bad order car and had a bad order tag on it. The tag was supposed to be red, but at the time was very weather beaten and faded. It is a fact that it had a red card on it, showing that it was a bad order car, and that it was in the yard in bad order awaiting its time to be taken to the shops for repair. The card was faded. There were 6 or 8 cars in the cut plaintiff was handling at the time he fell. They were on the oil mill lead before they were moved out on the main line. Bad order cars were very often stored on this track. I had a conversation with Mr. R. C. Andrews at Marshall, Texas, on September 4, 1912, and told him we very often put bad order cars on this track. I could not say whether all the cars in the cut of 6 or 8 cars had bad order tags on them. I told Mr. Andrews we were careful in handling bad order cars if we knew what was the matter with the car. I told him there were some cars marked bad order that we could not tell what was the matter with them unless we made a close examination of the car, and that sometimes they show on the tag what the car is in bad order for. I told Mr. Andrews that when a bad order tag was on a car it might have a draw-head out, a broken oil box, a broken hand-hold or a broken running board. I also told Mr. Andrews that when I went to get on a car with a bad order tag on it, I would be as cautious as I could knowing it was a bad order car. I would not be surprised when a car had a bad order tag on it

to find a hand-hold missing or a stirrup missing, and also stated that we found them bad order every day. In other words, when we found a car marked bad order we had to regard it as a bad order car and most anything could be wrong with it. In answer to the question as to whether when I found a car marked bad order I would examine the hand-holds carefully before going on the car, I said: "I don't know that I could stand there and look. I would see that I was safe. I would not go ahead and not examine it. I might find the whole top off when I got up there. I would be expecting to find something wrong with the car, and would not be surprised to find a stirrup gone, hand-hold or even a hole in the roof." I also said I would be expecting all those things and looking out for them if I found a bad order car. I was in the office of Mr. Andrews at Marshall about three or four hours after plaintiff was injured, and in the presence of Mr. Andrews, his clerk, Mr. Terry, and Mr. Kelly, the questions shown in the following statement were asked me, and the answers therein shown returned by me:

"Referring to injuries sustained by Switchman Rigsby in Marshall yard on morning of 4th. The reports we now have concerning this accident show that Mr. Rigsby's injuries were caused by falling from T. & P. 11,932, a bad order car in a cut with a number of other cars which were being switched at the time. We wish to find out how long this particular car, also the other cars that were being switched at the time had been in Marshall yard?

A. Could not say how long they had been in the yard. Something like two months though.

Q. Where were these cars located? A. On what we call the new yard lead runnig up back of the fire house.

Q. Had it been customary to store bad order cars on that track? A. Yes sir, except when the oil mill was shut down.

Q. Were all of these cars marked with bad order tags?

A. Yes sir. Now and then you will find one that has had the tag torn off.

Q. What is the practice when working in the yard when you find a car with a bad order tag on it? A. We handle it as carefully as possible.

Q. When a car is marked bad order are you supposed to know what is wrong with it? A. No sir. There are some cars that we could not tell what is wrong with them unless we would make a close examination of the car. Sometimes they show on the card what the car is bad order for.

Q. When you find a car in the yard with a bad order tag on it you know that something is wrong with the car, and it may be that it has a draw-head out, a broken oil box, has broken hand-holds or it may mean it has a broken running board. A. Yes sir.

Q. Did you examine T. & P. 11,932? A. After he fell from it.

Q. What kind of mark was on it? A. There was a bad order tag on it.

Q. If you had been going to get on the car would you have felt safe in getting on that car that the hand-holds would be all right; that the running board would be all right, or would you be very cautious about it on account of the bad order tag? A. I would be as cautious as I could knowing that it was a bad order car.

Q. You would not be surprised, then, in finding a car with a bad order tag on it, to find the hand-holds missing or the stirrup missing? A. No sir, we find them bad order every day.

Q. When you find a car in the yard that is marked bad order, you have to regard it as a bad order car and that most anything could be wrong with it? A. Certainly.

Q. If you had to climb up on a car with a bad order tag on it, would you examine the hand-holds carefully before you got on car? A. I don't know whether I would stand there and look. I would see that it was safe. I would not go ahead and not examine it. I might find the whole

top off when I got up there. I would be expecting to find something wrong with the car, and would not be surprised to find a stirrup gone, hand-hold or even a hole in the roof.

Q. You would be expecting all those things and would be looking out for them if you found a car bad order? A. Yes sir.

Q. Did all you gentlemen understand that this car was a "shop" car? A. Yes sir, it had a tag on it. You could not see the date on it.

Q. Did either of you hear Mr. Rigsby say on the morning he got hurt why he did not examine that car, or if he failed to do so? A. No sir. As we pulled the cars out he was standing at the lead switch. He went up on top of the cars to let the brakes off. The car was standing still when he fell.

Q. Was the hand-hold gone? A. It was loose at one end. It pulled clear loose at one end.

Q. Was the hand-hold in proper position when he first attempted to step on it? A. I did not see it myself; I could not say."

The questions and answers were written down as given. The mark on the car from which plaintiff fell indicated that it was to go to the shop for repairs. . Switchmen knew nothing of the billing of cars. Defective hand-holds were repaired on the Rip Track. This was the rule, but I don't know whether it was written or not. I have known bad order cars to be O. K'd.—that is, marked all right for use and used for cotton and lumber loading without being repaired. A bad order tag is for the purpose of notifying employes that the car is out of order, and to give notice to them to be careful in handling it.

IT WAS ADMITTED as proven that the life expectancy of the plaintiff is 21.95 years.

IT WAS ADMITTED that freight trains run over the main line of the defendant from Marshall, Texas, to Shreveport and New Orleans, Louisiana, a number each day, and three passenger trains each way each day.

J. T. KELLY TESTIFIED FOR DEFENDANT:

I was foreman of the switching crew in which plaintiff was working at the time he was injured. I was ten car lengths from him switching in between another cut of cars on the oil mill lead at the time he was hurt. We first went up in the oil mill lead and got about 15 cars, and plaintiff got on the first of those cars next to the engine and let the brakes off, and then went back to where I was making the cut southwest of the oil mill lead. I first cut off three cars and he rode them up the main line to set the brakes and stop them. I then backed over the switch and Terry threw the switch, and I gave the kick signal and stepped up to make the cut and that was southwest of plaintiff. I had not got the pin pulled when I heard he was hurt. I did not do anything more right then, but went to the main line. We were going to switch the cars out of the main line and take them to the shop. I got instructions to take them there from Mr. Jarboe, the shop foreman; he is general foreman of the car shops. He gives me the orders for the cars and the kind of cars he wants, and if he wants to take out any particular cars he tells me so. The car from which plaintiff fell and had what is supposed to be a red tag on it. The tag which you show me and which has printed on it "Repair Track. Bad Order T. & P. Ry." is the kind of tag that was on the car from which plaintiff fell. There was a tag on each side of the car. That tag means that the car is to go in the new shop for repairs. From where Rigsby was hurt to the shop is three or four hundred yards to the northwest. What is known as the Rip Track is at the west end of the yard, and northwest of where plaintiff was hurt; it is in the same direction as the shop but not so far. The rip track is two tracks that we put bad order cars on to be repaired, light repairs. Part of the rip track has a shed over it. Light repairs go there and heavy repairs to the main shop. Jarboe is general foreman of the shops and Dan Platt is foreman of the Rip Track. Sometimes there are bad order cars in the oil mill lead all the time and sometimes there are none

there at all. I don't think the oil mill was running at that time. We put bad order cars on the other tracks and anywhere we had room for them. My crew was called the scrap iron crew, and it worked altogether in the east end of the yard. We never went to the upper end of the yard unless the yard master sent for us. The commercial cars passing through from Texarkana to Shreveport or Longview were handled in the west end of the yard by another crew. There is an icing station near the oil mill lead, but it was not used at the time of the year that the accident happened. Jarboe had ordered 8 cars put in the shops that morning, and the three he rode in were the first of the eight. He was thirty or forty feet from the switch that opened the track to the shops. When I got them switched out, I intended to take the entire eight cars to the shop at once. I would go in the east end of the shops with the cars. I could not say how long those cars had been on the oil mill lead. I suppose the bad order tag was put on the car the day or night it came in. I do not know who put it on. That was a tag on either side of the car.

CROSS EXAMINATION:

The tags on the car from which plaintiff fell was a little lighter than the one shown me. I don't remember whether they were weather beaten or not. From the looks of the tags, they might have been out in the weather a month. They are put on new and become weather beaten after being put on the cars. I have seen cars have new shop tags on them, and they would do light repairs on them and put them in service again without their going to the shops. I have seen them put a rip track card on them and put them on the rip track. Don't remember seeing them just take the tag off and put the cars back in service. I presume 1500 men work in the shops at Marshall. Cars with tags on them are sometimes in one part of the yard and sometimes in another—that is, in the east end. We handle the bad order cars in the yard along with the good cars. Bad order cars sometimes get mixed up with good cars contain-

ing company material in there. If the inspectors find a car with a bad grab-iron they will not leave it there a month or two if they know it. They are supposed to be repaired within a reasonable time. If I came across a car out of repair that we were switching around every day or two I would take it to the shops and get Mr. Jarboe to repair it. I would not make a report that it was out of repair to anybody but Mr. Jarboe. I do not expect to find cars in use with defective hand-holds; I don't look for that. A man is supposed to be careful what he is doing and look out for danger. The car from which plaintiff fell had a chalk mark on it marking it new shops. Could not say whether that was older or younger than the tags. Mr. Rigsby got on the car next to the engine which would place him on top of the string of cars, and he went back over the tops of the cars to where I was going to make the cut. He let the brakes off as he went along. When I went to make the cut I told him that was as far as I was going and he stopped. We did not get a requisition for the cars. Mr. Jarboe would come along and say he wanted so many cars of such a class, such a series, and by series I mean capacity, some running 60 thousand and some 80 thousand. I believe this was a sixty thousand series. He told me to bring over so many sixties and I was getting them up for him. I do not know how long the car had been on the lead track. Have no recollection of when it was put in there. I might have handled that car 100 times and might have handled it but once, I don't know. I think in the Marshall yards they have four day car inspectors and four at night. My engine handles a great many cars a day, but I could not say how many. We may go on the oil mill lead several times a day and might not be on it for three or four days. I was on the north side of the cars and Rigsby was hurt on the south side. I looked at the hand-hold after the plaintiff fell. The nut was off the west bolt which held the hand-hold to the car. Two grab irons of that ladder were defective. The other one was right below the one from which he fell and was loose at the opposite end. When I swung in to make the cut, the

engine stopped so quick that it attracted my attention, and I dropped off and saw Terry running and I looked in that direction and saw the plaintiff on the ground. He was unconscious and I thought he was dead. He had a chew of tobacco in his mouth and we got the tobacco out of his mouth, and got some water down him and rubbed his hands, and by that time Mr. Jackson, a bridge foreman, got there with a wire cot, and we picked him up and laid him on the cot, and I asked him where he wanted to go, and he said to take him home. I sent Robinson to telephone for Dr. Moore. It was necessary for plaintiff to be on the cars and set the brakes to hold them and keep them from running away, and it was necessary for him to get off the car and go back and help finish the work. The part of the main line where he was hurt was used by all the trains going out from Marshall to Shreveport and coming in from Shreveport to Marshall. There are three passenger trains a day each way and four or five freight trains a way each day.

RE-DIRECT EXAMINATION:

Our crew is called the Scrap Iron Crew because we do not handle anything but scrap iron and bad orders; that is our work. I have worked there off and on a long time, and had been there about two months at that time.

RE-CROSS EXAMINATION:

We moved material and supplies into the shops and out, and did the switching for the lumber yard and oil mill, and handled cars loaded with telegraph poles and things like that.

C. TERRY TESTIFIED FOR DEFENDANT:

I was a switchman in the same crew with Mr. Rigsby at the time he was hurt and was following the engine. Mr. Kelly was foreman and Mr. Robertson was another switchman. I was 50 or 60 yards east of plaintiff when he fell. I was there to throw the switch for the oil mill lead and give the signal. We had brought out the three cars plain-

tiff was on and were going to put them back on the lead, and were figuring on switching out some more to the main line. After plaintiff came down from the car he was on his next work would have been to go back to the oil mill lead and set the brakes on the other cars. He had to go down on the south side to get to them and put the brakes on them. When the oil mill is not running, there is a lumber yard up there and we frequently have a car or two for them, and then there are telegraph poles lodaed and unloaded in on the lead and there is an ice plant there, and it is used to store bad order cars on. We try to store bad order cars on the tracks that are least used. The cars we were switching were going to the new shops for repairs. The foreman said we were to take them to the new shops. The car from which plaintiff fell had bad order tags on it. I don't know when that car came into the yards. If they are not put in the shops when they first come in, they wait their turn; they wait until they are ordered into the shops. We get an order for a lot of box cars, coal cars or whatever they want. We have no way of knowing when a car is brought in in bad order, except the tags; they stay there until they are ordered to the shops. When the tags are originally put on the cars they are red, and a brighter red than the tag you show me.

CROSS EXAMINATION:

The tags on the car from which plaintiff fell were very much weather beaten. They looked like they had seen much rain and weather. The length of time the tags had been on the car from their looks would be owing to the kind of weather that had prevailed and the number of rains that had fallen on them. According to the looks of the tags, they had been on the car a month, maybe more, maybe less. The tags are put on for the purpose of showing the cars go to the shops. I have never seen cars come in there and have tags put on them and afterwards taken off and the cars be put directly in service without repairs. I have seen them get light repairs, and they would then take them to

the lead track, and I have also seen them taken to the oil mill to load linter cotton to go to the compress. Such things as draw-heads and grab-irons we were supposed to find in serviceable condition on those cars, so we could use them. We have to use lanterns at night. Plaintiff was supposed to leave the car from which he fell and go across to catch the next cut of cars, but I don't know that it was necessary for him to run to do it. He had to get there by the time the cut of cars got there, and a switchman might have to run across there at times. He had to ctach the next bunch of cars and tie them down by setting the brakes or putting a block under the wheels to hold them. I do not think he would have time to be hunting around for defective grab-irons. If he stopped to hunt defects the string of cars would get away. There were two grab-irons loose on the side of the car from which plaintiff fell.

RE-DIRECT EXAMINATION:

Frequently when they were out of good order cars and could not get them, and wanted cars for linter cotton, they would run four or five of the bad orders in for linter to go to the compress. That would be during the oil season. Plaintiff was not hurt in the oil season, and we were not using the cars for that purpose at the time he was hurt. I have seen them take cars with the tags on them and use them for linter cotton as I have explained. Of course that was only temporary work, to take them to the compress and load them and to the compress and unload them. Saw plaintiff when he fell. I had thrown the switch and given the signal, and looked up and saw that the care were standing. I gave the engineer the stop signal before Kelly pulled the pin above there. The cars had not started back when plaintiff fell and he would not have had to run to get to them. Light repairs are supposed to be done at the rip track, and they do general overhauling and repairs at the shops.

RE-CROSS EXAMINATION:

They were kicking the cars pretty hard. We wanted to

get them all where we would not have to shove them in the next time. Rigsby was apparently dead when I got to him. We got some water from the bridge foreman and threw it in his face to revive him, and they brought a cot out and put him on it and carried him to the switch shanty. He said to let him down he was suffering so, he wanted to rest a minute. We put him down for a few minutes, and then carried him home. He was home in 20 or 25 minutes after he was hurt.

DR. J. A. MOORE TESTIFIED FOR THE DESENDANT:

I am chief surgeon for the defendant and held this position at the time plaintiff was hurt. I saw him in about thirty minutes after the injury. He was then suffering greatly from shock. I waited on him for two or three months. The principal injury was to the right hip and along the side of the chest wall and I watched his condition very closely while treating him. After a week or ten days there began to be a gradual improvement of the plaintiff's condition. As well as I remember I treated him about three months and he continued to improve. At the time I last saw him three months after the injury he was still complaining of his side and hip. At that time the symptoms of injury were nearly all subjective. There was nothing I could see wrong about his back at that time, and nothing I could see wrong about his hip. He still complained of pain and the symptoms were all subjected, appreciated by himself. The complaint of pain was in his hip and side. He was walking with one crutch at that time. He showed the ability to use both legs, but he complained that it hurt him to use his right leg. His right leg could be manipulated at that time, he could move it. He passed out of my hands in about three months. He was still complaining at that time that he was not getting any better. I thought he was getting better; he could get around and did get around. I saw him today and made an examination of him. As to his back the symptoms are practically subjective as far as I

can tell. I could not feel or see anything wrong with his back. I could not find anything wrong with the pelvis. The knee jerks are absent in the plaintiff. It is said there are well persons without the knee jerk. He has no paralytic symptoms that I could find. He complained that when he moved his right leg there was pain in the right hip and thigh. I found no condition to cause that. From the history of the case and my observation and treatment of it, I believe plaintiff is going to improve more, and I believe he will ultimately recover. It will probably take time for him to recover. If this law suit is ended and he tries to recover, I think the probability is that he will recover. He will probably recover in seven or eight months, something like that.

CROSS EXAMINATION:

Plaintiff appeared to be trying to help himself under my treatment; he was a very good patient; I think he tried to follow my advice the best he could. I saw no reason to suspicion that he was exaggerating his condition. He was badly hurt at the time. He received quite an injury. Falling on a hard substance like he did would naturally hurt a man pretty badly. The future of his condition is of course problematical. I say there is an absence of knee jerk. The usual cause of that is inflammation about the spinal cord. If you have a normal man you expect to find a decided knee jerk, and its absence is suspicious, especially if it is preceded by an injury to the back. Plaintiff still complains of tenderness in the region of his back and hip. He also complains of pain when he attempts to use the right leg, especially in an effort to bear his weight on it. Tom Owens at Marshall was treated by me; it has been about 18 months since he was injured. He was not away from his work three months. He does not have to climb on box cars and could not do it. His ankle was badly sprained and he thought he would be able to go to work in a week. Under certain conditions some people will go to work in a week, others in two or three weeks, and some people actually work when we are dumfounded, and others will lay off for months.

It depends largely on the patient. There will be some difference in any two injuries; they will nearly always take a different course to some extent. Plaintiff permitted me to examine him today.

RE-DIRECT EXAMINATION:

I have had experience with people that get hurt for 15 years. The tendency of nature is to repair injuries and they get better. They get better in time. Injuries are not usually the cause of the loss of knee jerk. It is usually something else. When it is not an injury, it is usually inflammation of the spinal cord from some other cause. I never saw a man where the only symptom of spinal injury he had was loss of the knee jerk. The results that follow a spinal injury are owing to the severity of the injury.

W. P. JARBOE TESTIFIED FOR DEFENDANT:

At the time plaintiff was hurt I had charge of the repair shops of the defendant at Marshall where heavy repairs are done. The cars that need repairs are kept out in the yards and I order them to the shops as I want to repair them. I sometimes send a note for the cars or make a kind of requisition. I usually get eight cars at a time; each track holds eight cars. If I have orders for certain cars and have material on hand for repairing them, I repair that kind. If we have orders for certain capacity box cars, we get them repaired if we have the material with which to do it. I know nothing of the injury to the plaintiff. I learned of it soon after it happened. When a car is to come to the shops, the universal rule is to put a tag on it. The Marshall shops were the main repair shops for the road both in Texas and Louisiana.

CROSS EXAMINATION:

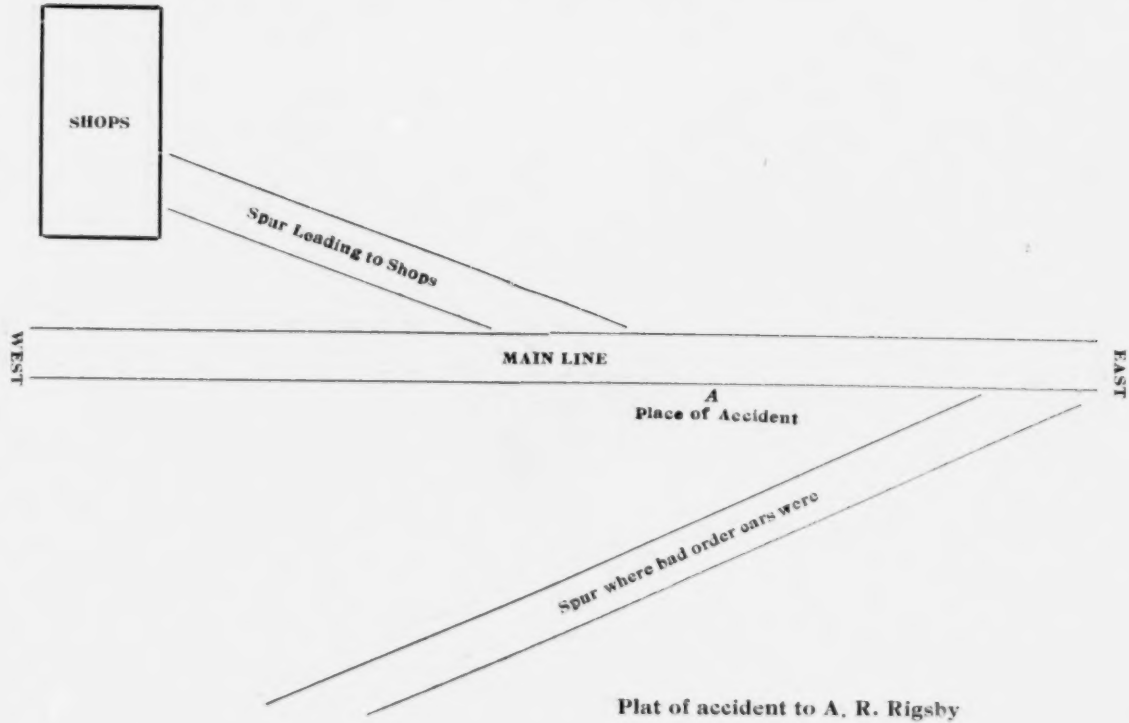
I saw the particular car from which it was said the plaintiff fell. There were two nuts off the bolts on the grab-irons, one off one hand-hold and one off another. I have nothing to do with the cars until they get into the

shop. When I finish repairing a lot of cars I notify the yard men that I am ready for others and they bring them in.

RE-DIRECT EXAMINATION:

Do not remember the repairs of the car except the grab-irons. Most of them have siding, draft timbers and new roofs to put in.

This is all the evidence.



Plat of accident to A. R. Rigsby

CHARGE. (Delivered Verbally).

Gentlemen of the Jury:

The Court instructs you as a matter of law that it will be your duty under the facts proven in this case to return a verdict in favor of the plaintiff, and the only question the Court submits to you is the measure of damages.

This, however, does not very materially lessen the delicate duty which you have to perform in assessing the damages to be awarded in this case. It calls for the very highest exercise on the part of the jury of prudence. The criterion to govern a jury in all cases of damages must be fair and reasonable compensation, and those terms mean, gentlemen, just what their plain English import suggest to your minds—that is, that the compensation ought to be fair and reasonable, just such compensation as fair minded men and reasonable men would allow in a case like the one before you here. It is entirely proper in order to assist the jury in determining what would be fair and reasonable compensation for me to suggest to you certain elements that ought to enter into your consideration in reaching a verdict, and certain elements you ought not to permit to enter into your consideration at all.

During the course of the argument the suggestion was made—I know without any intention of making an improper impression upon the jury, but it suggests this comment upon it—that in this case it would have required but little time for the defendant to have made the repairs on the car from which the plaintiff fell, and the jury might gather from that that the failure to exercise that little care and expend that little time calls for the imposition of punishment in the case. The element of punishment must not enter into your verdict at all. It would be my duty, in case the jury sought through the civil courts to punish a defendant, to set the verdict aside. There are courts, and there are dockets in this court, where punishments can be inflicted, and there are provisions in the law under which the plaintiff brings suit for the infliction of penalties, but not in this kind

of case. The only thing to govern the jury in this case is compensation to the plaintiff for the damage he has sustained, and you have no right to inflict penalties on the defendant, and therefore the element of punishment must not enter into the consideration of the jury in arriving at a verdict. There is another element that I desire to tell you must not be considered by you, and that is the matter of sympathy. Every reasonable man who is constructed along normal lines naturally sympathizes with every case of misfortune and injury, but sympathy must not be allowed in the jury box to influence the verdict of a jury. You would not have the right on account of the sympathy you feel to take money out of some man's pocket to gratify that sympathy, and therefore sympathy for the plaintiff ought not to be considered by the jury so far as reaching your verdict is concerned. You may have sympathy for him and every man who is unfortunate and injured, but when you come to making up your verdict the criterion must be fair and reasonable compensation, and as sympathy must not enter into the consideration of the jury, neither must prejudice have one particle of influence with you in determining the amount of your verdict. Neither should you permit the fact that the defendant is a railroad company and the plaintiff an employe to enter into the size of your verdict. The wealth or poverty of the parties must not enter into the consideration of the jury in reaching a verdict and assessing compensation. The law has provided, and the experience of ages has vindicated the wisdom of it, that the fairest way to reach compensation is through the verdict of twelve men. They are called from the various walks of life and various avocations and are constructed along various lines and angles, and their combined wisdom is more apt to lead them to the right thing than the opinion and judgment of one man, however learned he may be. Therefore, the law has left the question of compensation to twelve jurymen, simply saying to them that in assessing damages they must give only fair and reasonable compensation and exercise prudence and good conscience in doing that which is right.

Now, gentlemen, in reaching a conclusion as to what would be a fair and reasonable sum to award the plaintiff as compensation, it is proper for you to take into consideration the nature, character and extent of the injuries which you believe from the testimony before you the plaintiff received by virtue of his fall from the car. It is also proper for you to take into consideration the loss of time which you believe has been occasioned him as the direct result of those injuries. It is also proper for you to take into consideration the age and earning capacity of the plaintiff, but while the court tells you that it is proper to take into consideration his age and earning capacity, it is also proper to suggest to you that a man now 48 or 49 years of age will have his earning capacity diminished some as the burden of years come upon him, and that a man can earn one sum of money during one period of his life, and when he becomes older may not be able to earn the same amount of money, and therefore, while you are authorized to look to those elements in assessing the amount of compensation you will award plaintiff, it is proper to also take into consideration the fact which experience and observation teaches us that a man's earning capacity decreases as he becomes an old man. It is proper to take into consideration any pain, mental or physical the plaintiff has been occasioned as the direct result of his injuries received in falling from the car, and it is proper to take into consideration any permanent injury he has received, if you find from the testimony that he received permanent injuries. As to whether his injuries are permanent is a question of fact for you to determine. I can only say this in reference to the matter of permanent injuries: That the jury ought not to attempt to speculate or surmise as to whether plaintiff's injuries are permanent. The rule of law is that where the evidence shows with reasonable certainty that the injuries to a plaintiff are permanent, then the jury may take into consideration such permanent injuries. Where the proof fails to show with reasonable certainty that the injuries are permanent, the jury ought not to allow anything for what would other-

wise be permanent injuries. Take into consideration the facts and circumstances before you, and therefrom are prudent, conscientious, careful men ascertain and decide what sum of money in cash paid at the present time would be a faid and reasonable compensation for the injuries you believe plaintiff received by reason of his fall from the car on the question, and make that sum the amount of your verdict.

The form of your verdict will be: "We, the jury, find for plaintiff and assess his damages at ..... dollars," filling in the blank with the amount you find. Let your verdict be in writing and signed by a member of your body of your own selection as foreman.

MR. PRENDERGAST: We except to the refusal of the special charges requested by defendant, and we also except to the charge telling the jury to find for plaintiff.

Thereupon the Texas & Pacific Railway Company requested the Court to give the following special charges, each of which charges were refused by the Court and the Texas & Pacific Railway Company, then and there excepted to the Court's refusal to give each one of said charges, said charges being as follows:

1.

The Jury are charged:

In this case it appears from the evidence that the plaintiff Rigsby was employed by the Railway Company to work as a switchman in the Railroad yards at Marshall, Texas. And under his employment his duty required him to handle cars that were in bad order, brought to the yard to be placed in the shops to be repaired. And it appears that the car from which he fell was marked with a tag showing it was in bad order, and was to be placed in the shops there for repairs, and that at the time Rigsby was injured the car was being taken from the yard to shops to be repaired.

These facts do not show the defendant to be guilty of any negligence.

2.

The Jury are charged:

That in operating a Railroad it is unavoidable that cars will get defective and out of repair, and that it is necessary that these bad order cars should be conveyed from the yard to the shops to be there repaired. Therefore it would not be negligence for the Railway Company to place on certain employes the duty of so handling such bad order cars, and if the employe knows that it is his duty to handle such cars, he can not recover for an injury received in handling bad order cars.

3.

The Jury are charged:

That the evidence shows that plaintiff was injured while handling a car that was in bad order and out of repair. There is no evidence that the condition of said car resulted from any negligence of defendant. And it is not made to appear that the Railway Company could by the exercise of ordinary care dispensed with the handling of said bad order car, therefore you can not find the Railway Company negligent in handling the car when it did.

4.

The Jury are charged:

If you find it was customary in the Railroad yard at Marshall, to tag cars that were in bad order with a tag showing that fact and that such tag meant that the car should be taken to the shops for repairs, and that the car from which plaintiff fell was so tagged, then this was sufficient to give notice to the plaintiff that said car was out of repair.

And in such case the plaintiff can not recover.

6.

The Jury are charged:

If you do find for the plaintiff, you will take into consideration his age at the time of his injury, and consider whether or not his capacity to labor and earn money would

probably have decreased, had he not been injured, from the date of his injury on account of his increasing age, and if you so find you can not make the defendant company pay him for any diminished capacity to labor and earn money he would have suffered had he not been injured, by reason of his increasing age.

Special charge No. . . requested by defendant.

7.

The Jury are charged:

You are charged that if you do find for the plaintiff you can not allow him damages for a permanent injury unless you find by a preponderance of the evidence that his injury is permanent.

Special charge No. . . requested by the defendant.

Thereupon the jury retired and after consideration returned into Court a verdict in favor of the plaintiff for $11,500.00, and the Court entered judgment accordingly.

Upon the defendant's application, the Court entered an order granting the defendant forty-two days time to prepare and present its petition for a new trial and stayed execution until that time.

The Court also ordered the cause retained for the purpose of permitting the party to prepare and present bills of exception for a writ of error in the case.

And on the parties agreeing the time was further extended to January 15, 1914, and further extended to February 24, 1914, by agreement.

Motion for a new trial denied.

Approved as Bill of Exceptions.

GORDON RUSSELL, Judge.

Filed in the U.S. District Court Feb 20. 1914

A. R. RIGSBY

vs.

TEXAS & PACIFIC RAILWAY COMPANY.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS.

In this case I directed the jury to find a verdict for the

plaintiff and only left to their discretion the ascertainment of the amount of compensation to be awarded him. This action was complained of in a motion for a new trial. I overruled the motion for a new trial and, at the request of counsel for the defendant, am here giving my reasons for so doing. The facts upon which the verdict was directed will be found set out in the bill of exceptions and no attempt will be made to recite them here.

The case of C. B. & Q. Ry. Co. vs. U. S. was decided in the Circuit Court of Appeals for the Eighth Circuit, on April 24, 1909. In that case it was ruled that the duty imposed on railroad companies by the safety appliance acts then in force was an absolute duty, not dependable upon the exercise of diligence or of reasonable care. In that opinion the Circuit Court of Appeals said: "Whether a defendant carrier knew its cars were out of order or not is immaterial. Its duty was to know that they were in order and kept in order at all times." The doctrine above announced met with the approval of the Supreme Court of the United States when it delivered the opinion in this same case, as reported in 220 U. S. 559.

By the act of Congress of April 14, 1910, the safety appliance act was supplemented and amended, and it was provided in section 4 "that where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section 4 of this act or section 6 of the act of March 2, 1893, as amended by the act of April 1, 1896, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point." But while the carrier is thus exempted from liability for the penalties, it is expressly stated in the act that "such movement or hauling of such car shall be at the sole risk of the

carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employe caused to such employe BY REASON OF OR IN CONNECTION WITH THE MOVEMENT OR HAULING OF SUCH CAR with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other acts herein referred to."

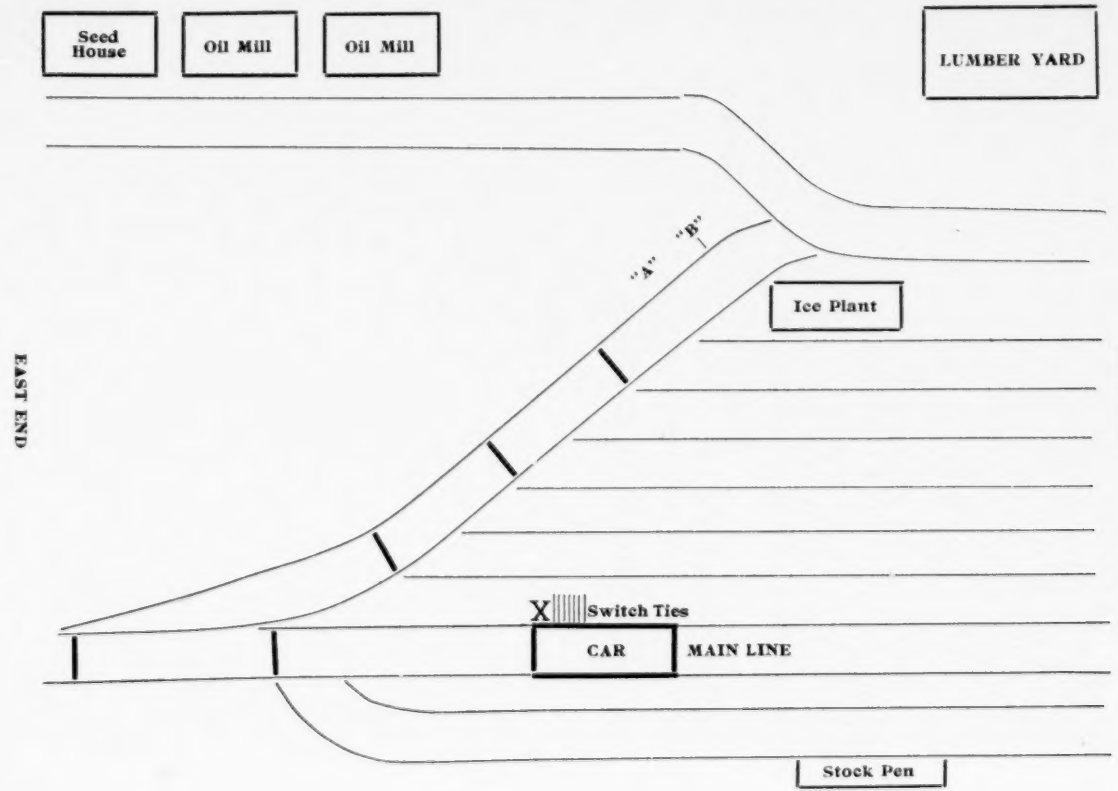
Therefore, I hold that under the undisputed facts of this case the liability of the defendant was absolute, and the only discretion left for the jury was to ascertain what would be a fair and reasonable compensation for the injuries which had been occasioned to the plaintiff.

GORDON RUSSELL, Judge.

Filed February 20, 1914.

J. R. BLADES, Clerk.

By W. E. SINGLETON, JR., Deputy.


Seed House
Oil Mill
Oil Mill
LUMBER YARD
"A"
"B"
Ice Plant
EAST END
WEST END
X
Switch Ties
CAR
MAIN LINE
Stock Pen

CLERK'S CERTIFICATE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AT JEFFERSON.

No. 597.

I, J. R. Blades, Clerk of the District Court of the United States for the Eastern District of Texas, at Jefferson, do hereby certify that the foregoing and attached papers of manuscript numbered in the margin of said pages (from 1 to 61 both inclusive) contain a full, true and correct copy of the record, bill of exception, assignment of errors, and all the proceedings in the cause No. 597, wherein the Texas & Pacific Railway Company are plaintiffs in error, and A. R. Rigsby is defendant, except that the original writ of error and citation in error are included therein, instead of copies thereof, as fully as the same remains on file and record in my office at Jefferson, Texas.

In testimony whereof I hereunto set my hand and affix the seal of the District Court of the United States of America for the Eastern District of Texas, at Jefferson, at my office in said City of Jefferson, this the 14 day of April A. D. 1914.

J. R. BLADES,

Clerk of the United States District Court, Eastern District of Texas, at Jefferson, Texas.

By W. E. SINGLETON, JR., Deputy.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of November 16th, 1914.

No. 2638.

TEXAS & PACIFIC RAILWAY COMPANY
versus
A. R. RIGSBY.

On this day this cause was called, and, after argument by F. H. Prendergast, Esq., for plaintiff in error, and S. P. Jones, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed April 29th, 1915.

In the United States Circuit Court of Appeals, Fifth Circuit.

Number 2638.

TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
A. R. RIGSBY, Defendant in Error.

Error to the District Court of the United States for the Eastern District of Texas.

F. H. Prendergast, for plaintiff in error.
S. P. Jones, for defendant in error.

Before Pardee and Walker, Circuit Judges, and Call, District Judge.

WALKER, *Circuit Judge:*

We understand that the provisions of the Safety Appliance Act are made applicable to any common carrier engaged in interstate commerce by railroad, that that act forbids such carrier to haul or to permit to be hauled or used on its line any car defective in a particular specified in the act and penalizes such a movement unless it is one from a place where the equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, even that movement being penalized unless it is necessary to get the required repairs made, and such repairs cannot be made except at such repair point. And we understand that the civil liability which may result from a violation of the act attaches if the move-

ment of the car is a prohibited one, though it is not one which sub
jects the carrier to the criminal penalty prescribed by the act. U. S
Comp. Stat. (1913), §§8605, 8613, 8617, 8618, 8621, 8622. Th
hauling of such a car over the line of such a carrier is within the pro
hibition of the act, though that movement does not constitute a us
of the car in interstate commerce. It was a purpose of the statut
to prevent the movement of such a car over such a line. Congres
had the power to prescribe this prohibition as a means of securing th
safety of persons and property transported in interstate commerce
Southern Railway Company v. United States 222 U. S. 20. The pro
hibited movement need not be an act of interstate commerce in orde
to render the carrier civilly liable to one injured as a result of the ca
being defective in a particular specified in the act. In this respec
there is a marked difference between the Safety Appliance Act an
the Employers' Liability Act.

The evidence in this case was without conflict to the effect tha
the injury to the defendant in error, a switchman employed by th
plaintiff in error, a common carrier engaged in interstate commerc
by railroad, was due to the defective condition of one of the rung
or grab-irons constituting the ladder to the top of a box car which a
the time was standing on the plaintiff in error's main line at Mar
shall, Texas, while switching was going on which was required t
complete a movement previously started of that with other cars fro
another track in the yard to the plaintiff in error's repair shop at tha
place. There was an absence of evidence tending to prove that th
defect which caused the injury could not as well have been repaire
or removed without making the movement of the car which had bee
partially executed when the injury occurred.

We are of opinion that the evidence showed a right of recovery i
the defendant in error, and that there was no reversible error in an
ruling complained of. It follows that the judgment should b
affirmed; and it is so ordered.

No. 2638.

TEXAS & PACIFIC RAILWAY COMPANY
v.
RIGSBY.

PARDEE, *Circuit Judge*, dissenting:

The 1st section of the Act of March 2d, 1893, (27 Stat. at Large
Chap. 996, page 531) provides that after the 1st day of January
1898, "It shall be unlawful for any common carrier engaged in in
terstate commerce by railroad to use on its line any locomotive engin
in moving interstate traffic not equipped with a power-driving brak
and appliances operating the train-brake system," &c.

Section 2d of the same Act provides that after the same date "i
shall be unlawful for any such common carrier to haul or permit t
be hauled or use on its lines any car used in moving interstate traffi
not equipped with couplers coupling automatically by impact an

which can be uncoupled without the necessity of men going between the ends of the cars."

Section 4th of the same Act providing for safety appliances, grab-irons, &c., provides that "it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab-irons or hand-holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

With this statute in force and referring to the same by Act approved March 2d, 1903, (32 Stat. at Large, Chap. 976, page 943) it was provided that the above mentioned act of March 2d, 1893, "shall be held to apply to common carriers by railroads in the territories and in the District of Columbia and shall apply in all cases whether or not the couplers brought together are the same kind, make or type," and further, "that the provisions and requirements hereof and of said acts" (referring to Act of March 2, 1893 and amendment April 1st, 1896—amendment, however, not pertinent here) relating to train brakes, automatic couplers, grab-irons, and the height of draw-bars, 'shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce and in the territories and District of Columbia and to all other locomotives, tenders, cars and similar vehicles used in connection therewith."

It was these provisions that were under consideration in Southern Railway Company v. United States, 222 U. S., 20, which was a case in which cars were hauled over a railroad engaged in interstate commerce, part of the cars involved being loaded with interstate traffic and part intrastate traffic, and all charged with having defective couplers.

In that case the Supreme Court held that the original Act as enlarged by the amendatory one is intended to embrace all locomotives, cars and similar vehicles USED (capitals mine) on any railroad which is a highway of interstate commerce.

The word used refers to use in moving interstate traffic as well as in moving intrastate traffic, for just following, in considering the question of the constitutionality of the act as so interpreted, the Court said:

"We come then to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect of vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirement of these acts to vehicles used in

moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce." Ib. pp. 26-27.

In the Rigsby case it is not proven nor claimed that the car in which Rigsby was injured was at the time being used in either interstate or intrastate traffic, or even being used at all. The undisputed facts appear to be that the car was out of use because of defective condition and had been for more than a month, and at the time Rigsby was hurt was not being moved for use. It was marked or labeled on each side with "Bad Order" tag, and was being moved from the bad-order track to the railroad shop for the purpose of being repaired and put in order for use. The liability of the railroad company in moving the car is not in anywise claimed as based upon use of the same and only because in moving the car to the shop for repairs it was for a very short distance required to be moved over a portion of the main track so as to reach the railroad shop. To move the car to the shop was the only way the car could be put in order for use in any traffic. It could hardly have been intended by the Congress that a railroad company under heavy penalties should keep its cars in perfect order with certain specific safety appliances and otherwise, and yet that after a disabled car has been taken entirely out of commerce, not to be used for any traffic whatever, the railroad company is to be penalized in favor of employes fully advised and warned that the car was in bad order and was to be moved only to the shop for repairs, for taking the only practical means at hand to have the car repaired and put in order.

Certainly, under the harshest view to be taken of the requirements of the Act of Congress, to penalize the railroad the out-of-order or disabled car must be used on a railroad engaged in interstate commerce; and in the Rigsby case the question was whether the disabled car on which Rigsby was injured was at the time being used within the meaning and purview of the said Act of Congress, and this under the evidence in the case was a question of fact which should have been submitted to the jury.

For error in directing the verdict the case should be reversed.

(Original Filed April 29th, 1915.)

Judgment.

Extract from the Minutes of April 29th, 1915.

No. 2638.

TEXAS & PACIFIC RAILWAY COMPANY
versus
A. R. RIGSBY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Texas & Pacific Railway Company, and the securities on the writ of error bond herein, J. H. Ardrey and E. R. Buddy, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Petition for Writ of Error, Order Allowing Same, and Assignment of Errors.

Filed June 8th, 1915.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2638.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
A. R. RIGSBY, Defendant in Error.

To the Honorable the Supreme Court of the United States:

Now comes the Texas & Pacific Railway Company and shows to this Court that in the above case wherein the Texas & Pacific Railway Company is plaintiff in error, and A. R. Rigsby is defendant in error, the United States Circuit Court of Appeals for the Fifth Circuit, on the 29th day of April, 1915, affirmed a judgment in favor of A. R. Rigsby against the Texas & Pacific Railway Company, for Eleven Thousand Five Hundred Dollars, which judgment had been rendered in the United States District Court for the Eastern District of Texas, at Jefferson; and in the proceeding of said case, and in the rendition of said judgment, manifest error hath happened to the great damage of the Texas & Pacific Railway Company, as is shown by the following assignments of error:

First.

The Circuit Court of Appeals erred in not sustaining the first error assigned, as follows:

"The Court erred in refusing special charge No. 1 requested by the defendant as follows:

The Jury are charged:

In this case it appears from the evidence that the plaintiff Rigsby was employed by the Railway Company to work as a switchman in the yards at Marshall, Texas, and under his employment his duty required him to handle cars that were in bad order, brought to the yard to be placed in the shops to be repaired. And it appears that the car from which he fell was marked with a tag showing it was in bad order, and was to be placed in the shops there for repairs, and that at the time Rigsby was injured the car was being taken from the yard to shops to be repaired. These facts do not show the defendant to be guilty of any negligence."

Second.

The Circuit Court of Appeals erred in not sustaining the second error assigned, as follows:

"The Court erred in refusing special charge No. 2 requested by the defendant as follows:

The Jury are charged:

That in operating a Railroad it is unavoidable that cars will not get defective and out of repair, and that it is necessary that these bad order cars should be conveyed from the yard to the shops to be there repaired. Therefore it would not be negligence for the Railway Company to place on certain employes the duty of so handling such bad order cars, and if the employe knows that it is his duty to handle such cars, he can not recover *from* any injury received in handling bad order cars."

Third.

The Circuit Court of Appeals erred in not sustaining the third error assigned, as follows:

"The Court erred in refusing special charge No. 3 requested by the defendant, as follows:

The Jury are charged:

That the evidence shows that plaintiff was injured while handling a car that was in bad order and out of repair. There is no evidence that the condition of said car, resulted from any negligence of defendant and it is not made to appear that the Railway Company could by the exercise of ordinary care dispens*ed* with the handling of said bad order car, therefore you can not find the Railroad Company negligent in handling the car it did."

Fourth.

The Circuit Court of Appeals erred in not sustaining the fourth error assigned, as follows:

"The Court erred in refusing special charge No. 4 requested by the defendant as follows:

The Jury are charged:

If you find it was customary in the Railroad yard at Marshall to tag cars that were in bad order with a tag showing that fact and that such tag meant that the car should be taken to the shops for repairs, and that the car from which plaintiff fell was so tagged, then this was sufficient to give notice to the plaintiff that said car was out of repair.

And in such case the plaintiff can not recover."

Fifth.

The Circuit Court of Appeals erred in not sustaining the fifth error assigned, as follows:

"The Court erred in charging the jury peremptorily to find a verdict for the plaintiff as follows:

The Court instructs you as a matter of law that it will be your duty under the facts proven in this case to return a verdict in favor of the plaintiff, and the only question the Court submits to you is the measure of damages."

Sixth.

The Circuit Court of Appeals erred in holding that the car from which plaintiff fell was at the time subject to the safety appliance act of Congress.

Error because the car at the time had been withdrawn from use of any kind and was only being moved from the yard into the shops for repairs.

Seventh.

The Circuit Court of Appeals erred in holding that A. R. Rigsby was at the time he was injured under the protection of the Safety Appliance Act of Congress.

Error because Rigsby's duty was to move bad order cars into the shop to be repaired and he was doing this work when injured.

Eighth.

The Circuit Court of Appeals erred in holding that Rigsby at the time he was injured was under the Safety Appliance Act of Congress.

Error because he was not coupling nor uncoupling cars, and not engaged in interstate commerce.

Wherefore the Texas & Pacific Railway Company prays for a writ of error directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding them to send up the Record in the above-styled cause that said errors may be corrected, and prays the Court to fix the amount of supersedeas bond at Fifteen Thousand Dollars, and that judgment be reversed.

(Signed) F. H. PRENDERGAST,
Attorney for Plaintiff in Error,
The Texas & Pacific Ry. Co.

Allowed and Bond fixed at $15,000.00.

(Signed) DON A. PARDEE,
Circuit Judge.

Bond on Writ of Error.

Filed June 8th, 1915.

In the United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
A. R. RIGSBY, Defendant in Error.

Know all men by these presents, That we, The Texas & Pacific Railway Company, a corporation duly incorporated and organized under and by virtue of an Act of Congress of the United States, as Principal, and R. H. Stewart and H. P. May, as sureties, are held and firmly bound unto A. R. Rigsby, in the sum of Fifteen Thousand Dollars, to be paid to the said A. R. Rigsby, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, using scrolls for seals, and signed with our names, this the 19 day of May, 1915.

The condition of the foregoing bond is such that, whereas, lately at a term of the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, in a suit pending in said Court between the Texas & Pacific Railway Company, plaintiff in error, and A. R. Rigsby, defendant in error, a judgment was rendered on the 29th day of April, 1915, affirming a judgment rendered in said cause on the 10th day of October, 1913, for the sum of Eleven Thousand Five Hundred Dollars with 6% interest thereon from date of judgment;

And whereas, the said Texas & Pacific Railway Company has obtained a writ of error and has filed a copy thereof in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, to reverse said judgment, and has also obtained a citation directed to the said A. R. Rigsby and his attorney of record, S. P. Jones, citing and admonishing him to appear in the Supreme Court of the United States in the city of Washington, District of Columbia, within thirty days from the date thereof.

Now if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs, if it fail to make good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

Witness our hands this 19th day of May, 1915.

(Signed) THE TEXAS & PACIFIC RAILWAY COMPANY,
By F. H. PRENDERGAST, *Its Attorney.*
(Signed) R. H. STEWART.
(Signed) H. P. MAY.

Approved:
(Signed) DON A. PARDEE,
Circuit Judge.

Clerk's Certificate.

UNITED STATES OF AMERICAS

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 62 to 75 next preceding this certificate contain a full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2638, wherein Texas & Pacific Railway Company is plaintiff in error, and A. R. Rigsby is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 61 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 9th day of June, A. D. 1915.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeal-, Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court, before you, or some of you, between The Texas and Pacific Railway Company, plaintiff in error, and A. R. Rigsby defendant in error, a manifest error hath happened, to the great damage of the said Texas and Pacific Railway Company, plaintiff in error as by its complaint appears; said judgment Rendered on April 29th 1915 we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at Washington, in not exceeding thirty days from the 7th day of June 1915, the date of issuance of the citation herein, in the said United States Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Supreme Court may

cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 7th day of June, in the year of our Lord one thousand nine hundred and Fifteen.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Allow
DON A. PARDEE,
United States Circuit Judge.

I hereby certify that a true copy of the within writ has this day been lodged in the Clerk's office for the use of the defendant in error.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

Dated this 8th day of June, 1915.

[Endorsed:] No. 2638. In the United States Circuit Court of Appeals, Fifth Circuit. Texas & Pacific Railway Company, Plaintiff in Error, versus A. R. Rigsby, Defendant in Error. Writ of Error. U. S. Circuit Court of Appeals. Filed Jun- 8, 1915. Frank H. Mortimer, Clerk.

UNITED STATES OF AMERICA,
Fifth Judicial Circuit, ss:

The President of the United States to A. R. Rigsby or S. P. Jones, his attorney, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be held at the City of Washington, within thirty days from the date of this writ, pursuant to a Writ of Error filed in the Clerk's office of the United States Circuit Court of Appeals, Fifth Circuit, wherein the Texas and Pacific Railway Company is plaintiff in error and A. R. Rigsby is defendant in error, to show cause, if any there be, why the judgment rendered against said Texas and Pacific Railway Company, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 7th day of June A. D. 1915, and of the Independence of the United States the *one hundred and* 139th year.

DON A. PARDEE,
United States Circuit Judge.

I accept service of the within Citation in Error on this 5 of June, 191–

S. P. JONES,
Attorney for Defendant in Error, A. R. Rigsby.

Citation filed June 8, 1915.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER, *Clerk.*

[Endorsed:] No. 2638. In the United States Circuit Court of Appeals, Fifth Circuit. Texas & Pacific Railway Company, Plaintiff in Error, versus A. R. Rigsby, Defendant in Error. Citation. U. S. Circuit Court of Appeals. Filed Jun- 8, 1915. Frank H. Mortimer. Clerk.

Endorsed on cover: File No. 24,806. U. S. Circuit Court Appeals, 5th Circuit. Term No. 523. The Texas & Pacific Railway Company, plaintiff in error, vs. A. R. Rigsby. Filed June 21st, 1915. File No. 24,806.

Office Supreme Court, U. S.
FILED
SEP 20 1915
JAMES D. MAHER
Clerk

No. 523

IN THE UNITED STATES SUPREME COURT

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error

vs.

A. R. RIGSBY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

By F. H. PRENDERGAST Attorney,
Marshall, Texas.

INDEX.

Rigsby received injury caused by a defective ladder on a box car while he was working as a switchman in the yard at Marshall, Texas. He recovered under the Safety Appliance Act.

First.

To recover he must bring himself under the Safety Appliance Act and under the Employers' Liability Act. Both the car and the man must be engaged in Interstate Commerce.

Ill. Central Ry. vs. Behrens, 233 U. S. 474 18
Pederson vs. Railway, 229 U. S. 146 18
Southern Ry. vs. U. S. 222 U. S. 27 4-13

Second.

The car was not under the Safety Appliance Act because it was had been withdrawn from all service for several weeks.

Southern Ry. vs. U. S. 222 U. S. 27 13-14
Southern Ry. vs. Snyder, 205 Fed. R. 870 19

Third.

The car was not under the Safet Aypplianese Act because it was not being used at the time in any character of commerce, but was being taken form the Railroad yard into the shops to be repaired.

Ill. Central Ry. vs. Behrens, 233 U. S. 474 17
Revised Statutes of Tex. 1911, Art. 6581 16
Southern Ry. vs. Snyder, 205 Fed. Rep. 870 19
Safety Appliance Act, 1910, Sec. 2 20

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Fourth.

Rigsby was not under the protection of the Safety Appliance Act because he was not at the time engaged in Interstate Commerce.

Boyle vs. Penn. Ry., 221 Fed. Rep. 455 ..... '3
Delaware L. & W. vs. Yerkomis, U. S. Sup. Court 15
Howards vs. Ill. Central, 207 U. S. 490 11
Ill. Central vs. Behrens, 233 U. S. 474 12
Moudon vs. N. Y. & N. H. Ry., 223 U. S. 51 11
Pederson vs. Delaware L. & W., 229 U. S. 146 12-13

Fifth.

Rigsby was not under the protection of the Safety Appliance Act because at the time he was injured he was not coupling nor uncoupling cars.

Bishop Non-contract Law, 446 11
Eugene F. Morgan vs. N. Y. Central & H. R., 212 U. S. 472 ... 10
Howard vs. Ill. Central Ry., 207 U. S. 490 11
Moudon vs. N. Y. & N. H. Ry., 223 U. S. 51 11
Potters D. Morris Stat. Con. 128, 140 8-9
St. Louis & S. F. Ry. vs. Conorty, U. S. Sup. Court 10
Sherman & Redfield Neg. Sec. 8 11
Safety Appliance Act, 1893, Sec. 4 7
Williams vs. C. & A., 135 Ill. 491 11

Sixth.

There was no common law negligence giving Rigsby a right to recover damages.

Flanagan vs. C. & N. W. Ry., 45 Wis. 98 21
Same Case, 50 Wis. 462 21
Watson vs. H. & T. C. Ry., 58 Tex. 439 21

IN THE UNITED STATES SUPREME COURT

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

A. R. RIGSBY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

By F. H. PRENDERGAST Attorney,
Marshall, Texas.

This is a suit by A. R. Rigsby for damages for personal injuries, verdict in District Court for plaintiff for $11,-500.00; the Railway Company sued out Writ of Error, and

the judgment was affirmed by the Circuit Court of Appeals at New Orleans, in a written opinion—Judge Pardee dissenting in a written opinion. Record 62, 63.

The case involves a construction and application of the Safety Appliance Act of Congress requiring ladders and grab-irons on cars.

Rigsby was in the Railway employ as a switchman in the yard at Marshall, Texas, and worked with a squad of men and a switch engine; and it was the special duty of these men to handle Company material, and to take bad order cars into the shops to be there repaired. He was injured under the following circumstances.

The Railroad Yard at Marshall contains about 60 acres and the main line of track runs through the yard east and west, and the shops and most of the track are on the north side of the main line.

Near the east end of the Yard a spur track branches off from the main line. Running southwest, on this spur track were some bad order cars marked in bad order with a red placard on each side which denoted they were to be taken into the shops for repairs. Some distance west of this spur track is another spur track leading from the main line to the northwest and into the shops. On this occasion the foreman in the shops made requisition on this switching crew to bring into the shops for repairs, a number of a certain class of cars, and the engine and men went to this spur track first mentioned and got some bad order cars and gave them a kick or send-up the main line west, intending to go back on the spur track to get others. When they kicked the cars up the main line Rigsby rode on the cars to set the brakes and stop them, and put the brakes on; he did this, and while descending from the car to return to the spur track he fell and was injured. His fall caused by a defect in one of the rungs of the ladder on the car.

The car had been out of service, and on this spur track for some days, perhaps a month.

On a trial before a jury the judge held the Railway Company liable on the authority of the case of C. B. & Q. Ry.

Co. vs. U. S. 220 U. S. 559, and left the jury to pass only on the amount that the plaintiff should recover.

The Railway excepted to this charge and requested several charges on the theory that the car was out of service, and it was Rigsby's duty to handle it and it was marked in "Bad Order" which was notice to him of its condition.

We have assigned errors in the order of their occurrence, but if either Rigsby or the car were not at the time covered by the Safety Appliance Act, the judgment should be reversed.

ASSIGNMENT OF ERRORS.

1.

The Court erred in refusing special No. 1 requested by the defendant as follows:

"The Jury are charged:

"In this case it appears from the evidence that the plaintiff Rigsby was employed by the Railway Company to work as a switchman in the yards at Marshall, Texas, and under his employment his duty required him to handle cars that were in bad order, brought to the yard to be placed in the shops to be repaired. And it appears that the car from which he fell was marked with a tag showing it was in bad order, and was to be placed in the shops there for repairs, and that at the time Rigsby was injured the car was being taken from the yard to shops to be repaired. These facts do not show the defendant to be guilty of any negligence."

2.

The Court erred in refusing special charge No. 2 requested by the defendant as follows:

"The Jury are charged:

"That in operating a Railroad it is unavoidable that cars will get defective and out of repair, and that it is necessary that these bad order cars should be conveyed from the yard to the shops to be there repaired. Therefore it would not be negligence for the Railway Company to place on certain

employes the duty of so handling such bad order cars, and if the employe knows that it is his duty to handle such cars, he can not recover from an injury received in handling bad order cars."

3.

The Court erred in refusing special charge No. 3 requested by the defendant as follows:

"The Jury are charged:

"That the evidence shows that plaintiff was injured while handling a car that was in bad order and out of repair. There is no evidence that the condition of said car, resulted from any negligence of defendant and it is not made to appear that the Railway Company could by the exercise of ordinary care dispensed with the handling of said bad order car, therefore you can not find the Railroad Company negligent in handling the car when it did."

4.

The Court erred in refusing special charge No. 4 requested by the defendant as follows:

"The Jury are charged:

"If you find it was customary in the Railroad Yard at Marshall to tag cars that were in bad order with a tag showing that fact, and that such tag meant that the car should be taken to the shops for repairs, and that the car from which plaintiff fell was so tagged, then this was sufficient to give notice to the plaintiff that said car was out of repair.

"And in such case the plaintiff can not recover."

5.

The Court erred in charging the jury peremptorily to find a verdict for the plaintiff as follows:

"The Court instructs you as a matter of law that it will be your duty under the facts proven in this case to return a verdict in favor of the plaintiff, and the only question the Court submits to you is the measure of damages."

The questions we desire to present are as follows:

First. The car at the time was not covered by the Safety Appliance Act, because it had been withdrawn from all service.

Second. The car was not at the time under the act because it was being taken into the shops as a part of the process of repair.

Third. Rigsby was not under the protection of the Act, because at the time he was not engaged in interstate commerce.

Fourth. Rigsby was not under the protection of the Act because he was not at the time engaged in "coupling or uncoupling cars."

Fifth. There was no common law negligence.

By making some general observations we think the Court can move readily understand what we say further on.

The Safety Appliance Act has two purposes:

One is penal and the other remedial.

In a penal action all the Government has to prove is that a car in the condition condemned by the Act was used on an Interstate Railroad. If there is an excuse the defendant must prove it.

In a remedial action the plaintiff must prove that the car was in the condition condemned by the Act, and that this condition caused the injury, and the plaintiff must have been engaged at the time in interstate commerce, else the Act of Congress can not protect him. Congress had no power to require Safety Appliance on cars for the protection of the citizens generally, except the traveling public in interstate travel.

Congress can require cars used only for local freight to be properly equipped if on an interstate track but only for the protection of employes engaged in interstate commerce, and this was the ruling in Southern Railway vs. U. S. 222 U. S. 27.

The car at the time was **on the track** of an interstate Railway, but was not used on that track. The inhibition is against using a car on an interstate railway.

By the Act of 1893, cars are required to be equipped with

grab-irons "on the ends and sides of each car for greater security to men in **coupling and uncoupling cars.**" And if an employe is injured by any car not so equipped he shall not be deemed to have assumed the risk.

And the Act of 1903 made the former Act apply to all cars used on any Railroad engaged in interstate commerce, whether the defective car was used in interstate commerce or not. (222 U. S. 27).

The Act of 1910 permitted the handling of a defective car to shops for repairs without incurring the penalty, but such handling of a defective car is at the risk of the Railway.

To our mind this clearly has reference to the Act of bringing a defective car from out on the road to the shops, and has no application to the handling of the car after it arrives at the yards containing the shops, such handling being in the process of repairs to be made and is in practical effect a part of the work of repairs. Pederson vs. Railway, 229 U. S. 154.

Suppose the Government inspectors should find a car on the main line, but not out on the road, and not being used commercially, surely the Company would not incur the penalty merely because the car was on the line.

Suppose a train of cars conveying local freight should not be equipped with proper grab irons, and hence in violation of the Law (222 U. S. 27) and a person handling this local train should be injured, he surely would not be protected by the Safety Appliance Act of Congress, although the Company would have incurred the penalty.

In a remedial action under the Safety Appliance Act of Congress, the injured employe must have been "coupling or uncoupling cars" at the time he was injured."

Rigsby was not using the ladder to couple or uncouple cars at the time he was injured, and is therefore not protected by the Act.

Rigsby had ridden the car up the main line and had set the brake and was coming down the ladder to go again to the spur track, when he fell. (Rec. 17).

The Statutes requires ladders and grab-irons "for the greater safety of men in coupling and uncoupling cars."

It lays down a requirement and then states the purpose for which the thing is required, not for the purpose of the safety of a man giving signals, or climbing on or off the car, or throwing switches, but for the man "coupling or uncoupling cars."

The use of this language shows not only the person whose safety was in view, but it shows on what part of the car the grab irons and ladder should be placed.

Rigsby would have been fully protected if a good ladder had been in the middle of the car. If the Statute had required efficient grab irons and stopped, then Rigsby would have been protected so far as this point is concerned, but it states the character of laborers whose protection was the concern of Congress. The law also requires couplers that will couple by impact. This is also clearly for the protection of persons coupling or uncoupling cars. Suppose an engine should push one car against a dead car and instead of making the coupling, it started the dead car to rolling and as a consequence some employe was injured by the rolling car, such injured person could not claim the benefit of the Statute though he might have a cause of action for common law negligence.

We know there are many rules for the construction and interpretation of Statutes. All of them are aids to determining the intent of the legislature. And it may be if we were now to write the Statute in question we would make it more comprehensive, by taking out the expression that shows the law was made to protect persons coupling or uncoupling cars, and make it protect all persons called on to use the ladder in performing their duties.

The Statute as it stands goes further than stating the reason the law was enacted, it states the purpose for which it was enacted, and states the very laborer that encountered a danger which was sought to be lessened or obviated by the Act.

The Statute requiring grab-irons states that they are

required "for greater security to men in coupling and uncoupling cars." Act 1893 Sec. 4.

Clearly Rigsby was not using the insecure grab-iron to couple or uncouple cars, he was not of the class whose safety was in the view of Congress.

The grab-irons are not required for the safety of persons climbing **upon or down from the car,** but for persons **coupling or uncoupling cars.**

We are assuming for the present that the car came under the Act, and the Railway would have incurred the **penalty** by having the car in that condition, (unless saved by the exception).

But we are considering a remedial action, the recovery based, not on common law negligence, but on the Statute, a Statute made expressly for men **coupling** or **uncoupling cars,** so we have a case where the **car** is under the Statute but the **party** is not.

It may be contended that the danger to a switchman is within the mischief to be remedied.

We may say it is within the mischief that should have been remedied. The Statute not noly makes a plain requirement, but states for what purpose it is required and for what employes it is required.

Even if we abandon the wording of the Statute and seek for reason to extend its application, we are at once met with reasons for excluding plaintiff from its protection.

The common law requires the Railway to have reasonably safe grab-irons, but that does not extend to cases like the one at bar where a switchman in a yard was handling a bad order car, so marked, for the purpose of having it repaired.

There is an infinite variety of instances where Statutes have been enacted for a specific purpose where the Courts have refused to apply it to other purposes.

One state will have a Statute requiring Railroads to fence their track, for the protection of live stock.

Another state will require it to prevent obstructions for the safety of the traveling public.

A Statute will require an alarm sounded by an engine on approaching a crossing for the protection of persons using the crossing, and not for a person on the track, though near the crossing or in a field near the crossing.

The mischief to be remedied by the "grab-iron" Statutes was the danger to men "coupling and uncoupling cars," not the danger to men moving bad order cars to be repaired.

If the car becomes disabled out on the road the Railway could bring it to the repair shop without incurring the penalty, but at the Company's risk of injuring an employe, but the question arises: What employe? Of course, not at the risk of injury to some employe handling the car after it got to the repair shop.

It was Rigsby's business to handle bad order cars into the shops, and he was as much a member of the repair squad as was the man in the shops who wielded the hammer or the saw.

The car must be **used** on a Railroad engaged in interstate commerce. Now, the Texas & Pacific Railway was engaged in interstate commerce, but was the car **used** on the road at the time of the accident? The car in fact was not being used at all in the sense of the Statute; the car had been withdrawn from **use** on the Railroad. The car was **on** the Railroad, but was not **used** on the Railroad. It had been withdrawn from use on account of defects, perhaps the very defects causing the injury.

The case relied on by the majority of the Court of Appeals (222 U. S. 27) was a suit for a penalty and the Judge arguendo refers all the time to a car in a **train**, though the train may be intra-state, and therefore does not foreclose the present case.

Potters, Dwarris on Statutes gives the following rules. Vattles Rule 20, Potters Dwarris page 128:

> "The reason of the law or treaty, that is, the motive which led to making of it, is one of the most certain means of establishing the true sense; and great attention ought to be paid to it whenever it

is required to explain an obscure, equivocal, and undertermined point, or to make an application of them to a particular case. As soon as we certainly know the reason, which alone has determined the will of him who speaks, we ought to interpret his words, and to apply them in a manner suitable to that reason alone."

Domat's Rules, Potter 140-141:

"To arrive at the meaning of a law, we are to weigh its terms and examine its preamble, if there be one, in order to judge of its provisions by its object and the whole context, and not to limit its interpretation to what would appear different from its intention, either in a single portion of the law or in a single defective expression. We must prefer the evident meaning of the whole law, to the inconsistent meaning of a defective expression."

"If any law or custom is established for particular reasons contrary to other rules of common right, it ought not to be applied except to those cases for which it is expressly intended."

"The best rule of interpretation to be adopted by the Courts, is, to ascertain the meaning of the legislature from the words used in a statute, and the subject matter to which it relates, and to restrain its operation within narrower limits than its words import, if satisfied that the literal meaning would extend it to cases which the legislature never designed to include. Brewer vs. Blougher, 14 Pet. 178." (Potter page 183).

"Further, as a rule of exposition, statutes are to be construed in reference to the principles of the common law. For it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did **not** intend to make any alteration, other

than what is specified, and besides what has been plainly pronounced; for if the parliament had had that design, it is naturally said, they would have expressed it." (Potter p. 185).

Since writing the above portion of the argument, this Court has very nearly decided the point here contended for in the case of St. Louis & San Francisco Railway vs. Conarty, on June 14, 1915.

In that case a switchman, riding on the forward footboard of a switch engine ran against a defective interstate car, which had been placed at a side track for repairs. The defect in the interstate car being that the drawhead was out, and by reason of this fact and collision between the engine and the standing car, Conarty was killed by the switch engine coming against the car. The switch engine was not intending to couple the engine to the car.

The Court held the Statute did not apply, saying:

> "Where a duty is imposed for the protection of persons in particular situations or relations, a breach of it which happens to result in injury to one in an altogether different situation, or relation, is not, as to him, actionable."

The provisions of the Statute under review in that case was the Statute which requires an automatic coupler, is shown only by implication that it was for the protection of men making couplings.

The Statute now under consideration in the Rigsby case, by express stipulation in the Statute itself, is to the effect that the requirement is "for the greater safety of men in coupling and uncoupling cars."

The dangers arising from coupling cars in the old fashion was the evil sought to be remedied by the automatic coupler provisions. (Johnson vs. Southern Pacific 196, U. S. 1). And the same danger is sought to be obviated by the provisions as to ladders and grab-irons, so expressed in the Statute itself.

In the case of the Eugene F. Morgan vs. New York Central & Hudson River Railway, 212 U. S. 472, the Court con-

sidered a "Pilot Rule" requiring a light to be displayed on each boat. This Court in effect held that the light was required to prevent collision with that boat itself, and, although, the absence of a light might cause an accident to some other boat, yet the other boat could not complain of the absence of the light. The Court using this language:

> "When a duty is imposed for the purpose of preventing a certain consequence, a breach of it that does not lead to that consequence, does not make the defendant liable for the tart of a third person merely because the observance of the duty might have prevented the tart."

In Williams vs. Chicago & Alton, 135 Ill., 491, (25 Amer. State Reports 39), cited in the Conarty case, the Court held that a Statute requiring the engineer to sound the alarm eighty rods from the crossing, was the duty due to a man using the public highway, and was not the duty of a man plowing in a field near by. The duty violated must be a duty owing to the party injured. (Bishop's Non-Contract Law, Section 446, Sherman Redfield on Negligence, 4th Addition Section 8).

In a remedial action based on the safety appliance Act of Congress, the injured employe must be engaged in interstate commerce at the time he is injured.

A. R. Rigsby was employed as a switchman in the Railroad yard at Marshall, and his duties were not to handle commercial cars in service, but to place cars in the shops and take them out. (Rigsby's evidence Record 16). And at the time he was injured he was taking a bad order car to the shops for repairs, so it seems plain that Rigsby at the time was not engaged in interstate commrece.

In Howard vs. Illinois Central Ry., 207 U. S. 490, the Court held that Congress had the power to make rules fixing the liability of interstate carriers to the employe injured while engaged in interstate business, but could not fix a liability to employes when not so engaged. And in the second Employers Liability Cases, Maudon vs. New York & N. H. R. 223 U. S. 51, the court called attention to the

fact that the present Act unlike the former one, deals only with the liability to an employe injured while engaged in interstate commerce, and for that reason held the Act valid.

The majority opinion of the court below calls attention to the difference between the Safety Appliance Act and the Employers Liability Act, stating that the former does not require the car on which grab-irons must be installed, shall be used in interstate commerce, and cites Southern Ry. vs. U. S. 222 U. S. 27. But that was a penalty case and did not involve a consideration of the status of an injured employe, and decided only that the Company would offend against the Act if it sent out a car on its line not equipped as required, even though that particular car was not used in interstate commerce.

We are not now concerned with the status of the car from which Rigsby fell, but we are considering the status of Rigsby himself.

Can Rigsby, who was not engaged in interstate commerce, recover for an injury caused by a defective ladder on a car, even if the car came under the safety appliance Act of Congress.

We say he can not because his welfare has not been committed to the keeping of Congress, and Congress has not undertaken to protect him even if it had the power.

A right of recovery arises only where the injury is suffered while the carried is engaged in interstate commerce and while the employe is employed by the carrier in such commerce.

Pederson vs. Delaware L. & W. 229 U. S. 146.

To the same effect is the holding in Illinois Central vs. Behrens 233 U. S. 474.

The District Judge held the defendant liable because the car was on the main line of an Interstate Railway and not equipped as required by the Safety Appliance Act, (See his opinion Rec. 58) on the authority of C. B. & Q. vs. U. S. 220 U. S. 559. And the majority of the Court of Appeals made the same holding on the authority of Southern Railway vs. U. S. 222 U. S. 27.

But I repeat, all these cases were considering the status of the car, not the status of the injured employe.

We say that under existing statutes no employe is protected unless and while he is employed in carrying on interstate commerce.

In Employers Liability Cases 207 U. S. 490, the first act was held void because it extended its protection to persons not carrying on Interstate Commerce, and in second Employers Liability Cases, 223 U. S. 51, the second act was held valid because it extended its protection only to men engaged in Interstate Commerce, and in the Behrens 233 U. S. 474, this Court confined the protection of the act to persons injured at the very time they were performing labor in Interstate Commerce.

Then upon what reason can we extend the protection of the safety appliance to persons not at the time of the injury engaged in interstate commerce.

Rigsby's duty did not call him at any time to handle commercial cars, but to handle only Company business, and at the time he was taking a bad order car into the shops. (Rec. 16). In Boyle vs. Penn. Ry. 221 Fed. Rep. 455. The injured party was employed by a road engaged in interstate commerce and was inspecting a train on a side track when a train passed on the other track and killed him. Neither of the trains were loaded with any interstate freight or passengers. The Court said: "The application of the Act of Congress is made to turn upon two facts. The death or injury to the employe must have been caused while the defendant company was a common carrier engaged in interstate commerce and while the employe was employed in such commerce." We know this was a case under the Employers Liability Act, and not under the Safety Appliance Act, but there is no difference between the two acts, as to the status of the employe asserting its protection. He must be at the time of the injury engaged in interstate commerce.

If Rigsby was engaged in interstate commerce then every man in the shops who may be called on to repair a car would be so engaged. In the Pederson case 229 U. S. 154,

this Court held that a man carrying bolts to repair a bridge was engaged in repairing the bridge and as the bridge was used in interstate commerce the man was engaged in said commerce. So if Rigsby was taking the car into the shops to be repaired he was engaged in repairing the car. In the Pederson case, where the party was repairing a bridge, and was held to be engaged in interstate commerce because the bridge was used in such commerce, the bridge would be like the track, a part of the business of interstate commerce used at all times, while the car to be repaired will be used in interstate commerce only at the future will and pleasure of the Company. Interstate Commerce could not be carried on without using the bridge and the track; while it could be completely carried on without using any particular car.

It is common information that an engine on a Railroad has habitually a particular run for a certain part of the track, and if an engine is habitually used in running from one state to another, then if that engine is taken out of the service temporarily to be repaired, I can readily see how the repair of that engine would be a part of the Interstate Commerce work, if the engine was intended to be put back at once in the Interstate Commerce service.

If the proposition is presented that every man repairing a car is protected by the Employers' Liability Act, that question can be presented only when the acts or conduct of the man repairing the car causing damage to some other person engaged in Interstate Commerce, by analogy to the reasoning in the case of Southern Pacific Railway vs. U. S. 222, U. S. 27.

In that case the idea is advanced that a local train on an Interstate track must have the Safety Appliance, not to protect the man running on that local train, but to protect other men running on an Interstate train.

In considering the Safety Appliance Act, we must constantly keep in mind the question to be decided—whether it is a suit by the Government for a penalty, or a remedial action for the damages caused by the defect.

In a penalty suit, we should consider the law as seeking to prevent probable evil consequences to occur in the future for a violation of its provisions.

In a remedial proceeding we consider the Statute in its application alone to what has been done in the past, and the fact that the defect under consideration might tend to injure some one in the future is an irrelevant inquiry. The defect must have actaully caused the injury to the complainant.

The majority of opinion calls attention to the fact that the Safety Appliance Act is broader than the Employers' Liability Act, in that the Safety Appliance Act does not require the car to be at the time used in Interstate Commerce. This distinction obtains only when you are considering the penalty imposed by the Safety Appliance Act. In every suit for damages, the plaintiff must bring himself under the Employers' Liability Act, and it is only when he had done so that he can appeal to the Safety Appliance Act to aid his case.

Logically, then, the first inquiry is this: Has the party brought himself under the Employers' Liability Act. And if he has, the next thing to be determined, is this: Was the defective car at the time, under the Safety Appliance Act. So the plaintiff, in a damage suit, must bring himself under both acts if he seeks to recover on Statutory negligence.

In the case at bar, Rigsby seeks to recover by reason of the violation of the Safety Appliance Act, and the majority of opinion permits a recovery without showing that Rigsby is under the Employers' Liability Act. Such a construction of the law brings it into conflict with the first Employers' Liability cases, in 207 U. S.

If an employe on an Interstate train, while at work, should be injured by the negligenec of a co-employe on a local train, then the Act of Congress would apply.

The injured employe must be engaged in Interstate Commerce, though the co-employe whose negligence injured him, need not be so engaged. Such was the holding in the Pederson case (229 U. S. 151).

The employe of an Interstate Railway, while mining coal to be used by the Railway in Interstate Commerce, is not engaged in Interstate Commerce if he is injured while mining the coal. So held in Delaware L. & W. Railway vs. Yurkonis, cited by this Court June 21, 1915.

In a remedial action under the Safety Appliance Act of Congress, the bad order car must have been used in transportation over an Interstate Railroad at the time of the injury.

The car from which Rigsby fell had been disabled somewhere at some time and was on a spur track in the yard awaiting to be repaired, it had been withdrawn from commercial use perhaps a month, and had on either side a red tag or placard, which signified it should go to the shops for repairs and Rigsby was employed to take it into the shops, and was so engaged when he fell from it caused by a defective rung in the ladder. The second hand-hold from the top gave way. (Robertson's evidence Rec. 35).

Under these facts we say the car was not in the service at all and was not required to have secure grab-irons or ladders, and indeed the defect in the ladder may have been the defect, or one of the defects, that caused the car to be taken out of service.

Some suggestion is made that the car could have been repaired where it stood on the spur track. The character of repairs needed is not shown, but a red tag meant the car must go into the shops. (Rec. 36, 37). And besides we have a statute in Texas requiring repairs to be done in sheds or houses. Rev. Stat. of Texas of 1911, Art. 6581, as follows:

> "SHALL PROVIDE SUITABLE PLACES FOR EMPLOYES TO WORK—Every person, corporation, or receiver, engaged in constructing or repairing railroad cars, trucks or other railroad equipment, shall erect and maintain a building or shed at every station or other point where as many as five men are regularly employed on such repair work, the building or shed to cover a sufficient

portion of its track so as to provide that all men regularly employed in the construction and repair of cars, trucks, or other railroad equipment shall be sheltered from rain and protected from other inclement weather. The provisions of this article shall not apply at points where less than five men are regularly employed in the repair service, nor at division terminals, or other points where it is necessary to make light repairs only on cars, nor to cars loaded with time or perishable freight, nor to cars when trains are being held for the movement of said cars. (Art 1910, p. 123, Sec. 1)."

So the car could not have been repaired on the spur track.

The Statute requires all cars used on an Interstate Railway to be equipped with ladders, and this Court held in Southern Ry. vs. U. S. 222, U. S. 27, that this applied to a car conveying local freight if it was used on any Railroad engaged in Interstate Commerce.

This conclusion was reached on a consideration of the very intimate relations existing between cars loaded with Interstate freight and cars loaded with local freight, and the dangers to the employes on Interstate cars from the defects in the other cars. The Court was not considering the danger on any particular occasion, but the danger that might arise from such a practice. That is, if there were defective cars on a local train it might endanger employes on a through train.

In the case at bar the Company was not liable to the penalty because the car came within the exception, and the only question remaining is this:

Was A. R. Rigsby, who was employed to handle bad order cars from the yard to the shop, entitled to recover by reason of the fact that the Safety Appliance Act was violated by having a defective ladder on the car?

In the Illinois Central vs. Behrens, 233 U. S. 474, Behrens was a fireman on a switch engine, which handled indiscriminately local and Interstate cars almost every hour,

but at the time he was injured he was handling only local cars and no Interstate cars.

The Judge delivering the opinion of this Court first states that Congress had the power to have embraced him in its protection, and then proceeds: "Passing from the question of power to that of its exercise," he quotes the Employers' Liability Act, and then says, giving the words: "Suffering injury while he is employed by such carrier in such commerce," their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employe is engaged is a part of Interstate Commerce. He then quotes from the case of Pederson vs. Delaware L. & W. R. Co., 229 U. S. 146, as follows:

> "There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in Interstate Commerce, and while the employe is employed by the carrier in such commerce. The true test always is: Is the work in question a part of the Interstate Commerce in which the carrier is engaged?"

And closes the point as follows:

> "Here, at the time of fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another. That was not a service in Interstate Commerce and so the injury and resulting death were not within the statute. That he expected, upon the completion of that task, to engage in another which would have ben a part of Interstate Commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

A similar view was taken of the statute by Judge Russell in the case of Van Brimmer vs. T. & P. Railway, 190 Federal Reporter 394. In that case Van Brimmer was a brakeman engaged on a train hauling interstate cars, but

in the train was a certain car which had been loaded and put in the train at Dallas, a point in Texas, and to be set out at Etholine, another point in Texas, and while setting out this car at Etholine, after it had been taken out of the train of others cars, plaintiff was injured while doing the work of setting the car out on the side track. The Court held that at the very time the plaintiff was injured he was engaged in an act on furtherance of purely domestic and Intrastate Commerce, and he consequently concluded that the plaintiff was not injured while engaged in Interstate Commerce.

There is another view of the case which shows that the Interstate Commerce law does not cover the injury to the plaintiff in this case, and that is that the car in question had been entirely withdrawn from other commercial cars and the road had performed all it could perform to take the car out of Interstate Commerce. This point was considered in Southern Railway Company vs. Snyder 187 Federal Reporter 492, where the Court of Appeals of the Sixth Circuit, held that cars of an Interstate Railroad which are generally used interchangeably and indiscriminately in both Interstate and Intrastate traffic, are subject to the Act of Congress, but not so while actually devoted to purely Intrastate use, even though not set apart for such use. They, however, held that while the Railway may move empty cars by themselves to repair shops to be repaired, may be guilty of a violation of the Act of Congress, yet in so moving them in order to exclude them from being subject to the act, they must be wholly excluded from commercial use themselves and from connection with other vehicles which are commercially employed. In that opinion the judgment was reversed. The question on a motion for rehearing was again considered in 205 Federal Reporter 870. Upon a consideration of the case of the Southern Railway against United States 222 U. S. 20, the judgment was affirmed. The Court, however, using this language in the opinion:

> "In our former opinion we pointed out, in effect, that while a carrier may, without violating

the Safety Appliance Acts, move empty cars by themselves for the purpose of having them placed in condition to compy with those acts, yet, in any movement for the purpose even of repairs, after they have become so defective, such cars must, in order to escape subjection to the act, be wholly excluded from commercial use and from connection with other vehicles commercially employed."

It occurs to me that it would be a very strained and unnatural construction of the Act to hold that a car that had become defective and taken out of the service in order to have it repaired should be held to be under the Safety Appliance Act merely because while taking it from the yard to the shop to be repaired it was taken across the main line of the Railway, which main line was used in Interstate Commerce. True, the car was to be taken up the main line a few hundred feet, but that circumstance does not change the principle and the car would be just as much under the statute if it had been taken square across the main line, and the Court must hold that the car was being used on the main line if it was taken across it, to affirm the judgment.

The language of Sec. 2 of the Act of 1910 is that the Road must not "have or permit to be hauled or used on its line any car not equipped with grab-irons."

Is it not clear that this means, as Judge Pardee held in his dissenting opinion, that the car must be in commercial use, not necessarily Interstate Commerce, but some sort of commercial use that would bring it into intimate association and relation to cars used in Interstate Commerce, for it is this intimate association and use that justifies Congress in requiring a local car used on an Interstate Road to be specially equipped.

We think if the Safety Appliance Act does not apply that the judgment will have to be reversed. But to show that the Court should not have given the peremptory charge, but should have given the special charge asked by the defendant, we make this proposition:

Where freight cars are in bad order and placed

on side tracks and marked in the usual way with tags indicating they are to be taken to the shops for repairs no liability arises from the injury to an employe caused by the said defect while moving the cars to the shops for repairs.

It was proven that the car had been out of order for some days, placed on a side track in the yard at Marshall and marked with a red tag showing that it was in bad order and to be taken to the shops for repairs, and while it was being taken to the shops plaintiff received his injury by reason of one of the grab-irons pulling out which caused him to fall. (Rec. 45).

We are submitting that these facts do not raise any presumption of negligence on the part of the Railway Company. It does not appear how the car came to be in bad order; therefore, it does not appear that it was the result of any negligence on the part of the Railway Company. It was necessary that it should be taken to the shops to be there properly repaired and there is no complaint in the method of handling the car while it was being removed to the shops. It had placed on either side of the car a red tag indicating its bad order and indicating it was to go to the shops for repairs. There is no controversy about the facts on this branch of the case, and if the Interstate Commerce law does not apply to the case, as we have endeavored to show it does not, then the judgment should be reversed on the ground of the evidence not being sufficient to show negligence. The Railway Company is not chargeable with negligence merely because it delays for any length of time to repair a broken car while it remains unused and not so situated as to create danger, nor merely because it moves such car to the shops for repairs and does not make such repairs at the place where the car was injured. Flannagan vs. C. & N. W. Ry. 45 Wis. 98, same case on a second appeal, 50 Wis. 462, same case 2 Amr. Eng. Ry. Cases 150.

The duty of removing damaged cars to the repair shops of the Railway Company may be imposed on any employe who will assume risk, and where a car is marked out of or-

der, it is sufficient to give notice to the employe who undertakes to remove the car. Watson vs. H. & T. C. Ry. 58 Texas 439, where Flannagan case cited above is approved.

But on this branch of the case I need not dwell longer because the cause has been decided on the other ground, and even if the case should turn on liability for common law negligence there surely was a question for the jury to decide.

We pray that the judgment be reversed.

F. H. PRENDERGAST,

Attorney for Plaintiff in Error,
The Texas & Pacific Ry. Co.

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.
vs.
A. R. RIGSBY,
Defendant in Error.

No. 523.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO AFFIRM OR DISMISS AND BRIEF AND ARGUMENT OF DEFENDANT IN ERROR ON SAID MOTION.

S. P. Jones,
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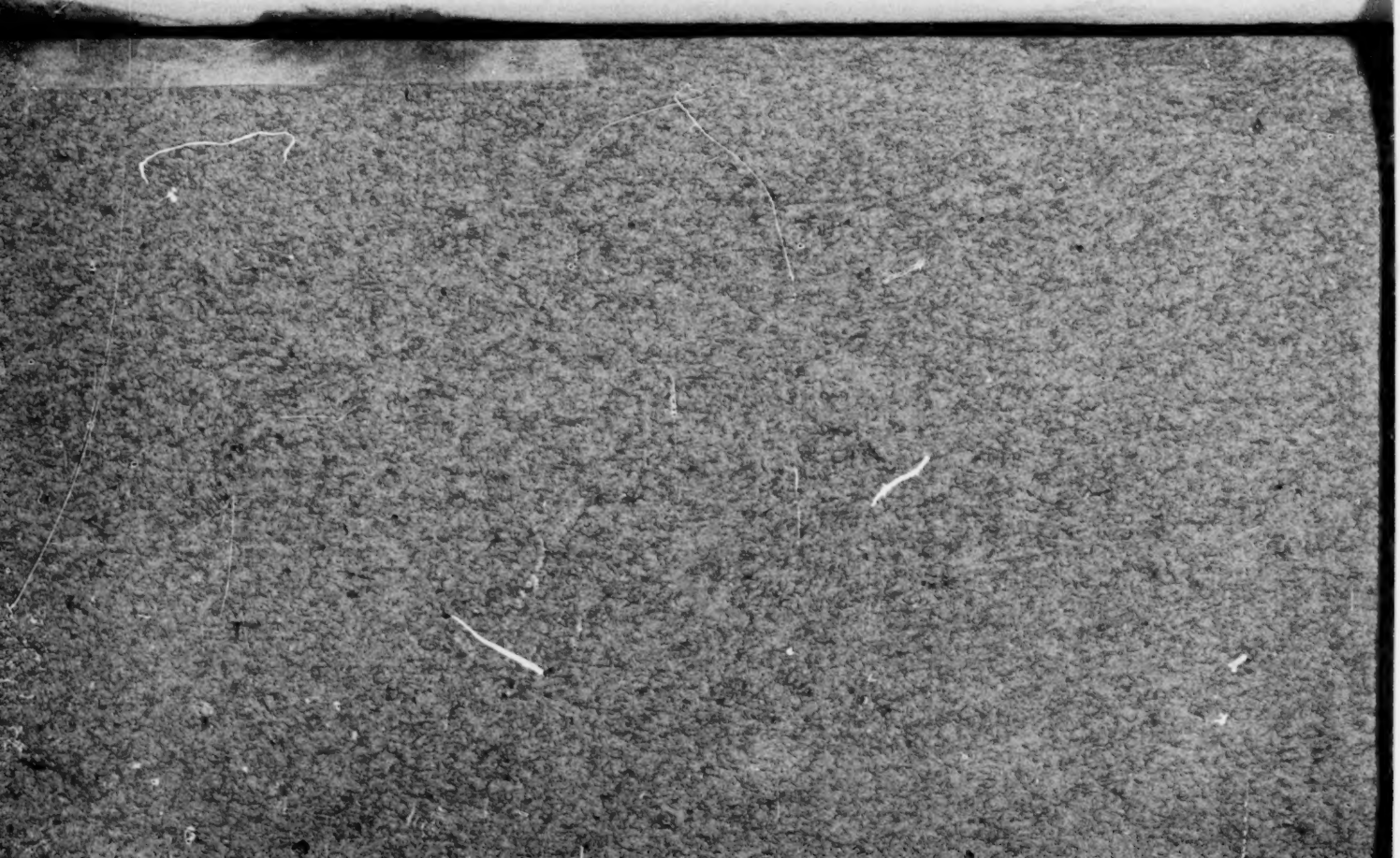

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MOTION TO AFFIRM OR DISMISS FILED BY THE DEFENDANT IN ERROR.

Now comes A. R. Rigsby, by his attorneys appearing in that behalf, and moves the Court to affirm or dismiss the above entitled cause under sub-divisions 5 and 6, of Rule Six of the Supreme Court of the United States, be-

cause it is manifest that the Writ of Error in this cause was sued out for delay only, and that the questions on which the decision of said cause depend are so frivolous as to not need further argument. And the said Defendant in Error further shows that, there being no substantial merit in said contention of the Plaintiff in Error, and the said writ of error having been sued out for delay only, the Plaintiff in Error should be required to pay 10 per cent damages on the amount of the judgment and accrued interest for said delay.

STATEMENT OF NATURE AND RESULT OF CASE.

A. R. Rigsby recovered a judgment in the District Court of the United States for the Eastern District of Texas, at Jefferson, Texas, against the Texas & Pacific Railway Company for Eleven Thousand, Five Hundred ($11,500.00) Dollars actual damages for personal injuries which he received in falling from the top of a car while engaged in the service of the Railway Company, as a switchman, in its yards at Marshall. The injuries received by the Defendant in Error were caused by a failure of the Plaintiff in Error to comply with the Safety Appliance Laws of the United States.

The case was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit by divided Court, the majority holding that the Safety Appliance Laws applied, and the dissenting opinion holding that they did not apply.

On or about the 12th day of September, 1912, the Defendant in Error received the injuries in substantially the follow manner, to-wit:

He was employed as a switchman in Marshall, and with other members of the crew, handled and switched cars in the yards at Marshall. The Railway Company operated a line of railway from Marshall, Texas, to New Orleans, Louisiana, and had its main shops at Marshall, Texas, where cars for the entire line, engaging in interstate and intrastate traffic, were overhauled and repaired. The Marshall yard was used for switching and handling the commercial business of the company, interstate and intrastate, and the bad order cars were repaired and overhauled at the shops. There were a great number of trains —at least six passenger, and a number of freight— which passed over the main line of the Railway Company through the Marshall yards to Louisiana, thus engaging in interstate business.

On the day Defendant in Error was injured (a few minutes after he began work) the switch crew, of which he was a member, pulled a number of cars from a track in the yard to the main line of the Plaintiff in Error (which was an interstate highway between Texas and Louisiana, reaching Louisiana twenty miles East of Marshall). The Defendant in Error was on top of a car for the purpose of setting the brakes to hold it in position, and the car, with two others, was pushed westward on said

main line where the same was to be left while the switch crew was to go back into the side track to switch and handle other cars. The Defendant in Error set the brakes on the car to leave it on the main line while he was to walk across the yard to assist in further movement of cars; when he started to descend from this car he fell by reason of a grab iron or the rung of a ladder being disconnected, striking his back against a pile of switch ties which inflicted upon him injuries to the amount of the judgment.

The particular car from which the Defendant in Error fell, as well as the other cars being handled, were what were known as "bad order cars," tagged as such, and had been in the yards for probably one month, though Defendant in Error had no notice of their defective condition. The car was to be later transferred to the shops in another part of the yard for general repairs. The defect which caused the injury to the Defendant in Error was one that could have been repaired by a car inspector in about five minutes (Tr. 36).

At the time the Defendant in Error fell from the car, by reason of the defect referred to, the car was on the main line of the road between Marshall, Texas, and New Orleans, Louisiana, which was a general thoroughfare for interstate commerce.

The trial court directed a verdict in favor of the Defendant in Error, because he was injured by reason of the Plaintiff in Error failing to comply with the Safety Appli-

ance Laws, and the jury awarded him damages in the sum of Eleven Thousand, Five Hundred ($11,500.00) Dollars.

In the United States Circuit Court of Appeals it was held that the car was being used on a line of railroad engaged in interstate commerce and the verdict was sustained, though there was a dissenting opinion. There is no plain error of record.

The Defendant in Error, by his attorney aforesaid, presents with this motion to affirm, with damages, a printed brief and argument in support thereof, which is hereto annexed.

WHEREFORE, the Defendant in Error prays that the said cause be affirmed with damages. Or that, if the motion to affirm or dismiss is not granted, the cause be transferred for hearing to the summary docket and disposed of.

S. P. Jones,
Bibb & Scott,
Marshall, Texas.
Attorneys for Defendant in Error.

IN THE

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OCTOBER TERM, 1915.

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Defendant in Error.

No. 523.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR ON MOTION TO AFFIRM OR DISMISS.

STATEMENT OF THE NATURE AND RESULT OF THE CAUSE OF ACTION IN THE TRIAL AND CIRCUIT COURT OF APPEALS.

In September, 1912, A. R. Rigsby was in the employ of the Plaintiff in Error as a switchman at its yard in Marshall, Texas, engaged in switching cars used in interstate and intrastate commerce and cars to, and from, the

repair shops to be repaired for service in interstate and intrastate commerce. The main line of the railroad from Texas to Louisiana, over which interstate commerce was handled, ran through the yards at Marshall, east and west, and there were a number of side tracks on the south side thereof, and the main repair shops were on the north side thereof.

The injuries were received by Rigsby substantially as follows:

On the 12th of September, 1912, a few minutes after his crew began work, the engine went into the track from the east (see map p. 60), and was attached to a number of cars, about the points "A B," Ribsby taking his position on the one farthest from the engine. These cars were brought out on the main line and three cars shoved west on the main line where they were stopped and Rigsby set the brakes to hold them in position while further work was to be done on the tracks south of the line. Rigsby started to descend from the car to walk across to aid in the further work, when, by reason of one of the rungs of the ladder, or grab irons, being defective, one end being disconnected, he was caused to fall and to receive the injuries for which the suit was prosecuted. The defect was one covered by the Safety Appliance Laws of the National Congress and could have been remedied without the car having been moved. The car had been in the yard for more than a month, and was to be carried to the main shops, on the north side of

the main line, for general repairs. When Rigsby fell from the car it was on the main line of Defendant's railroad, which runs from the passenger depot in Marshall to New Orleans, La., over which many passenger trains and freight trains engaged in interstate commerce were operated daily. The witnesses testified that portions of a car, to be handled by switchmen, etc., were supposed to be placed in good repair before the cars were moved, and that the repairs to the ladder, or grab iron, could have been made in a short time, at comparatively no expense. (Tr. 36). "The portions of a car to be handled by switchmen, such as hand-holds, grab irons, etc., are supposed to be placed in a sound and safe condition before being handled by the switchmen." (Also Tr. 36). "It would have taken a car inspector or repairer about five minutes to have repaired the defective hand-hold, which caused plaintiff's fall. He would have had to screw a nut on the bolt that held the hand-hold." (Tr. 43). "I do not expect to find cars in use with defective hand-holds; I do not look for that." (Tr. 46). "Such things as drawheads and grab irons we were supposed to find in serviceable' condition on those cars so we could use them. (Also Tr. 46). "I do not think he would have tried to be hunting around for defective grab irons; if he stopped to hunt defects, the string of cars would get away. There were two grab irons loose on the side of the car from which plaintiff fell." (Tr. 44). "It was necessary for plaintiff to be on the cars and set the brakes to hold them

and keep them from running away, and it was necessary for him to get off the car and go back and help finish the work. The part of the main line, where he was hurt, was used by all of the trains going out from Marshall to Shreveport and coming into Marshall from Shreveport. There are three passenger trains a day each way and four or five freight trains a day each way." (Tr. 49). "The Marshall shops were the main repair shops for the road, both in Texas and Louisiana."

This case involves the application of what is known as the *Safety Appliance Acts* of the National Congress, it being contended by Defendant in Error that Rigsby was entitled to the protection of the Safety Appliance Laws, and by the Plaintiff in Eror that he was not. While confident that the National Safety Appliance Laws were applicable to the case, the Defendant in Error, also contends that the Court correctly directed a verdict for the Defendant in Error, if the Safety Appliance Laws were not applicable.

Section 4 of the Safety Appliance Laws of 1893 provided for grab irons and hand-holds for the use of persons coupling and uncoupling cars, engaged in interstate commerce. Section 8 gave to any employee of any such common carrier, injured by cars in use contrary to the provisions of the Act, a cause of action. The Act of March 2nd, 1903, made the provisions of the Safety Appliance Laws, adopted in 1893, and amended in 1896,

apply to "all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, etc." Section 2 of the Act, approved March 14, 1910, provides that it shall be unlawful for any common carrier to haul, or permit to be hualed, or used on its line, any car subject to the provisions of the Act not equipped with secure ladders on cars requiring such ladders. Section 4 of the Act, April 14, 1910, provides that cars becoming defective in regard to safety appliances may be moved to a repair shop, if the repairs cannot be made without such handling, without incurring the penalties prescribed, but that such movement is made at the risk of the carrier as regards remedial actions for injuries to employees; thus the law applicable to the rights of the Defendant in Error may be condensed into the following statement:

The car was in use on a railroad engaged in interstate commerce when Defendant in Error was injured. The defect was one covered by Section 2 of the amendment to the Safety Appliance Act of April 14, 1910, and if the Safety Appliance Laws were applicable, the plaintiff was entitled to a verdict under Section 8 of the Act of 1893, giving a cause of action to injured employees, and under Section 4 of the Act of April 4, 1910, making the railway liable for injuries inflicted in the movement of defective cars.

Section 1 of the Act of March 2, 1903, and all of the subsequent laws required that all cars used on any rail-

road engaged *in interstate* commerce be equipped with safety appliances, and extended the right of recovery to persons injured by reason of defective safety appliances on cars being used on railroads engaged in interstate commerce. The Plaintiff in Error seriously contends that the trial court should not have directed a verdict for the Defendant in Error, claiming that the Safety Appliance Laws were enacted for the protection of persons engaged in coupling cars, and that the employee must have been engaging in interstate commerce at the time; and also that the car was not being used in interstate commerce at the time Defendant in Error was injured. It is clear that the provisions of Section 2 of the Act of April 14, 1910, required the car to be equipped with secure grab irons if it was to be used on an interstate highway, and that Section 8 of the Act, approved March 2, 1893 gave the cause of action, and that Section 1 of the Act, approved March 2, 1903, and all subsequent laws, extended the requirement of safety appliances to cars used on railway *engaged in interstate commerce*, and extended the right of recovery of employees of such railroads injured by reason of a failure of the railways to comply with the requirements of the Safety Appliance Law.

In view of the fact that the purpose of this legislation, as shown by an examination of the history thereof, including the messages and recommendation of the President to the National Congress, was to protect the persons

engaged in the extra hazardous business of handling and switching cars, as referred to in the opinion of Chief Justice Fuller in the case of Johnson vs. Southern Pacific Ry. Co., 196 U. S., 13, a narrow and constructed definition of the words used to express the law, and given a right of action for damages resulting for the breach thereof, should not be resorted to. It was clearly the intention of the National Congress, as manifest by the language used to prevent cars with defective safety appliances from being placed upon railroad lines that were used as interstate highways so as to fully protect interstate passengers from injury and the inconvenience of delay, and to prevent injury to employes engaged in interstate commerce, or working on interstate highways, even though at the time engaged in intra-state commerce. See the opinion of Justice Vandeventer in the case of Southern Railway Company vs. United States *222*, U. S. *23*, where it said: "The defendant, while operating a railroad which was 'a part of a through highway' over which traffic was continually being moved from one state to another, hauled over a part of its railroad, during the month of February, 1907, five cars, the couplers upon which were defective and inoperative. Two of the cars were used at the time in moving interstate traffic, and the other three in moving intra-state traffic; but it does not appear that the use of the three was in connection with any car or cars used in interstate commerce. The defendant particularly objected to the assessment of any penalty for the hauling

of the three cars, and insisted, first, that such a hauling in intra-state commerce although upon a railroad over which traffic was continually being moved from one state to another, was not within the prohibition of the safety appliance acts of Congress; and, second, that if it was, those acts should be pronounced invalid, as being in excess of the power of Congress under the commerce clause of the constitution. But the objection was overruled (164 Fed. 347) and error was assigned upon that ruling.

"The original act of March 2, 1893, (27 Stat. at L. 531, chap. 196 U. S. Comp. Stat. 1901, p. 3174), imposed upon every common carrier 'engaged in interstate commerce by railroad' the duty of equipping all trains, locomotives and cars used on its line of railroad in moving interstate traffic, with designated appliances calculated to promote the safety of that traffic and of the employees engaged in its movement; and the second section of that act made it unlawful for 'any such common carrier' to haul or permit to be hauled or used on its line of railroad any car 'used in moving interstate traffic,' not equipped with automatic couplers capable of being coupled and uncoupled without the necessity of a man going between the ends of the cars. The Act of March 2, 1903, (32 Stat. 943 p. 1909, cap. 967 U. S. Comp. Stat. Supp. 1909, p. 1143) amended the earlier one, and enlarged its scope, by declaring, inter alia, that its provisions and requirements should apply to all trains, locomotives, tenders, cars and

similar vehicles used *on any railroad engaged in interstate commerce* and in the territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith.' Both acts contained some minor exceptions, but they have no bearing here.

"The real controversy is over the true significance of the words 'on any railroad engaged' in the first clause of the amendatory provision. But for them the true test of the application of that clause to a locomotive, car, or similar vehicle would be, as it was under the original act, the use of the vehicle in moving interstate traffic. On the other hand, when they are given their natural signification, as presumptively they should be, the scope of the clause is such that the true test of its application is the use of the vehicle on a railroad which is a highway of interstate commerce, and not its use in moving interstate traffic."

Referring to the general definition of the word "use," 39 Cyc., 846 "to make use of; to employ; to put to a purpose; to employ for any purpose, etc.; also Webster's International Dictionary: "To make use of; to convert to one's service; to avail one's self of, etc."; we see no reason for the suggestion or contention that at the time Rigsby was injured the car in question was not "in use on an interstate highway," especially in view of the decision of this court in case of Delk vs. St. L. & S. F. Ry.

Co., 220 U. S., 580. The Delk case arose under the Safety Appliance Law of 1893, and the right of recovery was dependent upon whether the car was being *used* in interstate commerce at the time Delk was injured. The car was loaded with interstate freight, and had been placed on a repair track, marked with a bad order card, and material sent for with which to make repairs. Delk was required to couple another car to the bad-order car, (presumably not in interstate service) and, by reason of the defective safety appliances, was crippled. The Railway Company contended that the car was not "in use," but had been withdrawn from service. This court, as I understand the opinion, held that the car was in service; or, in other words, the act of coupling the cars constituted such *use* as rendered the Railway Company liable for injuries resulting therefrom. The opinion in the Delk case emphasizes our contention that the car from which Rigsby fell was *in use* on an interstate highway at the time he was injured, for in the Delk case the trial court held that the car was being *used* in interstate commerce. The Circuit Court of Appeals, by a majority opinion, held that it was being *used* in interstate commerce. This court also held that it was being *used* in interstate commerce; and also announced the doctrine that the safety appliance laws impose an absolute duty upon the carrier to provide its cars with the safety appliances and keep them in proper condition,

and that too, without any reference to the care or diligence which might have been exercised in performing its statutory duty.

In the Delk case there could not have been a recovery if the car had not been in *use*, for, under the Act of 1893, there was liability only when the car was being used in interstate commerce. Therefore, this court appears to be committed to the doctrine that any movement, or use of a car, comes within the meaning of the term "use," as found in the safety appliance laws. It is quite clear that this is the proper construction to be given the law, for it surely was not the purpose of Congress to, by fine distinction, extend the beneficent effects of the safety appliance laws to only a portion of the persons whom it sought to protect, and to them only part of the time. It is clear the law was intended to, and did, make them insurers of the safety of those who might be called upon to use these appliances on interstate highways, and, as clearly shown by the amendments of 1896, 1903 and 1910, to extend it to the protection of the greatest number and to the fullest extent wherever, by fair construction of the words used, it will protect the employees. An examination of the safety appliance laws, and especially those relating to the use of secure grab irons and hand-holds on ladders, shows that they refer to appliances that can be repaired without expense at any place on the road or in the yards by any unskilled laborer in only a few seconds; thus the defect which

caused the injury to Rigsby could have been repaired by any unskilled laborer in one or two minutes by simply placing a nut upon the end of the stud that should have held the grab iron in position. It was not at all necessary for the car to have ever been moved without these repairs being made, and the movement, or use, of the car in that condition was inexcusable, regardless of the safety appliance laws which were violated by its movement, and such movement was almost certain to result in the character of disaster that caused injury to Rigsby; or one that would cause death or injury to a great number of interstate passengers and employees.

In the case of the United States vs. Southern Pacific Ry. Company, 94, U. S. C. C. A., 629, it is said that these safety appliance laws impose an absolute duty on carriers to maintain their equipment, which duty is not performed by the exercise of reasonable care. The facts in the Southern Pacific case just referred to showed that the car was placed in the yards for the purpose of repair; that the yard was congested and that the car was hauled from a repair track to an interchange track, or vice versa, in and about the yard, and it was held that this constituted a violation of the safety appliance law and rendered the railway company liable for the penalty.

By analogy we must reach the conclusion that since the safety appliance laws were amended in 1903 and 1910 so as to make the provisions of the safety appliance laws

apply "to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce*******, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith," and to apply to cars requiring secure ladders, and making it the duty of the Railway Company to equip such cars with secure hand-holds or grab irons, that any car that was thereafter used in any manner upon the main line of an interstate highway came within the protection, and subjected the company to the penalties and remedial action provided for in the original safety appliance laws, regardless of whether the car having the safety appliance defects was being used in interstate commerce.

Section 4 of the amendment of 1910 to the safety appliance laws gave to the carrier the right to move a car over an interstate highway with defective safety appliances, if the same could not be repaired without such use, but it is specially provided in said section that the carrier thus using, or moving a car, with defective safety appliances over an interstate highway, is liable, in a remedial action, for all damages resulting from an injury to persons using the same. In short, that the carrier that uses a car on an interstate highway with a defective safety appliance becomes an insurer of the safety of persons who are called upon to use the car, notwithstanding the same may be in no way connected with, or interfere with, the handling or movement of interstate commerce. In other words, the

protection is enlarged by these amendments so as to do everything possible to insure that the interstate highway shall be, at all times, absolutely free of cars not equipped with all of the safety appliances required by the acts of the National Congress.

The provisions of the Safety Appliance Laws, and the amendments referred to, clearly show that they apply to cars and engines used on interstate highways in purely local business, as well as the persons so using them; but if there could have ever been any doubt as to the full protection awarded thereby, the same is entirely removed by an examination of the case of Southern Railway Company vs United States, 222 U. S., page 20, where it is definitely and unqualifiedly announced "cars used in moving intra-state traffic on a railway which is a highway of interstate commerce are comprehended by the provisions of the safety appliance acts of March 2nd, 1893, as amended by the acts of March 2nd, 1903, declaring that inter alia that its provisions and requirements shall apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and in the District of Columbia, and all other locomotives, tenders, cars and similar vehicles used in connection therewith." Therefore, inasmuch as the Defendant in Error was descending from a car that was in use on, in fact, blocking the main line of a railroad engaged in interstate commerce—a main artery of interstate com-

merce at the very time he was injured—it is clear that the Safety Appliance Law referred to, was applicable, and that the trial court very correctly directed a verdict in his favor. Nor can the suggestion that because Defendant in Error was not engaging in interstate commerce at the time he was injured (if that be true) in any way relieves the Plaintiff in Error from liability, for the remedial action provided for in Section 8 of the original Safety Appliance Act is made to apply to all of the amendments thereafter adopted, and applies to persons injured by defective safety appliances being used in intra-state commerce when in use on an interstate highway.

The rights of the Defendant in Error are in no way dependent upon the question of whether he was actually engaged in interstate commerce at the time he was injured, because the safety appliance act affords protection to all employees (regardless of whether they are engaged in interstate or intra-state commerce) who may be injured by reason of the failure of the railway company to comply with the safety appliance acts of the National Congress. Therefore, when a safety appliance becomes defective, in a purely intra-state movement on an interstate highway, the employee of the railway company who receives injuries by reason thereof, is given the same full protection and indemnity, is insured against loss of his time, etc., just as much as if he were engaged in interstate commerce instead of intra-state commerce.

In case of Railway Company vs. King, 94 C. C. A., 652, it is said there is nothing in the safety appliance statutes that limits the class of person to whom the carrier shall be responsible for damages that may result from its illegal doings, and attention is by that case directed to Section 8, which provides that any employee of any such common carrier who may be injured by any locomotive, car, train, etc., shall not be deemed to have assumed the risk.

It appears to me that the Rigsby case clearly comes within the safety appliance laws of the United States Congress, for at the very time Rigsby was injured the car was being used on a railroad that was an interstate highway, and on the main line of such interstate highway, and in fact, blocked interstate traffic at the moment he was injured, and therefore it comes within that provision of the law that makes it unlawful for the railway company to use upon a road that is an interstate highway any car not equipped with the safety appliances required.

The Plaintiff in Error has filed a brief in this case, which is devoted to three propositions:

FIRST: That the safety appliance laws were not intended to protect persons using the grab irons in climbing to and from cars, but to protect persons only in coupling and uncoupling cars;

SECOND: That the car was not being used, or in use, at the time Rigsby was injured;

THIRD: That if the safety appliance laws applied to the car at the time Rigsby was injured, that the injured employee not being engaging in interstate commerce at the time, was not protected by the law.

In answer to the suggestion that the safety appliance laws were not intended to protect persons using the ladders to ascend and descend from the cars, attention is called to the fact that the original safety appliance law of 1893, as amended in 1903, required grab irons, etc., for the protection of men in coupling and uncoupling cars, but that the amendment of April 14, 1910, provides for the equipment of cars with secure ladders, running boards, etc., which, of course, extends the protection to all persons engaged in climbing to and from the cars, and in using the running boards, etc. It will also be observed that the amendments of 1896, 1903 and 1910 specially provide that all of the provisions of the safety appliance acts of 1893, including Section 8 thereof, giving employees injured by reason of defective safety appliances a cause of action, are made to apply to each and all of the amendments, and each and all of the cars, vehicles, etc., that come within the provisions of the amendments and to each

and all of the employees who may be injured by reason of the failure of the carrier to comply with the safety appliance laws.

I cannot appreciate the force of the argument that the beneficent protection given by the safety appliance laws is to be so restricted as to withdraw from the protection thereof a person who is called upon to climb to and from the cars while being used on an interstate highway.

The suggestion in brief of Plaintiff in Error that the car was not in service, or was not being used at the time Rigsby was injured, has been heretofore fully answered.

In reply to the suggestion that an employee, using a car on an interstate highway, is not entitled to the benefits of a law in a remedial action, I suggest that, by special provision, each and every amendment to the safety appliance laws gives the persons using the car the protection and benefit that was given in the original act of 1893, to those persons who were called upon to use cars with defective safety appliances in purely interstate service. In all of the decisions, so far as I remember, including the case of Illinois Central Ry. Co. vs. Behrens, 233 U. S., 474, in which it was claimed that the case arose under the Employers' Liability Law, it was held that Congress could have extended the protection to Behrens, as he was engaged on an interstate highway, but that it had failed to extend the protection to persons working on such high-

ways, generally. The safety appliance laws provide protection for each and every person called upon to use a car with defective safety appliances on an interstate highway. Therefore, the distinguishing difference between the rights of a person claiming damages under the safety appliance laws, and a person claiming damages under the Federal Employers' Liability Act is, if the injury is caused by a defective safety appliance at a time when the car is on an interstate highway, the employee is permitted to recover damages in a remedial action, even though he, himself, be not engaged in interstate commerce, while a person claiming the right to recover damages under the Federal Employers' Liability Act must show that at the very time he received the injury he was engaging in interstate commerce.

The suggestion that an employee, injured by reason of a defective safety appliance on a car in use on an interstate highway, cannot recover unless the employee, himself, be engaged in interstate commerce, is not supported by any of the authorities cited by the Plaintiff in Error, is in direct conflict with the provisions of the safety appliance laws, and the amendments thereto, and is contrary to the general tendency of the Congress to enlarge the scope of the National legislation in protection of the railroad employees who are called upon to use cars on the interstate highways. Nor do I consider that there is any force in the argument that inasmuch as this court has decided in

the case of the Southern Railway Company vs. United States, 222 U .S., 27, that the Railway Company is liable for the penalties prescribed by the safety appliance laws where the cars were on the interstate highway but not in interstate service, that the benefits of the law will be denied employees in remedial actions. The amendment of 1903 and the amendment of 1910 clearly extend the provisions of the safety appliance law to all cars that are used on interstate highways, and Section 4 of the amendment of 1910 clearly provides, in substance, that a person injured by reason of a defective safety appliance is entitled to recover, even though the car was being moved to a repair shop for repairs that could not be made without such movement; and even though the injury to the employee was due to the very defect for which it was necessary for the car to be moved for repair.

These safety appliance laws should not be given a narrow and restricted meaning, such that would impose a penalty upon the carrier for using a car on an interstate highway with defective appliances, and not award to the employee injured thereby the right to recover damages, unless he was engaging in interstate commerce at the time.

As announced in the case of Southern Railway vs. United States 222, U. S. 20, "the several trains on the same railroad are not independent in point of movement and safety, but are interdependent; for whatever brings

delay or disaster to one, or results of disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train, but to others."

It occurs to me that it is quite evident that the safety appliance laws apply to locomotives, cars, etc., whenever and wherever they are located on the rails of an interstate highway; or, in other words, a railroad that is engaged actively in interstate business, and that it is not restricted to the actual rails of the main line of such interstate highway, but applies to and covers all of the side tracks, spurs and like appurtenances and connections that are used by it in conducting its interstate business, and that it even extends to repair tracks, if there be such, on which cars that are used indiscriminately in interstate and intra-state business are stored while awaiting orders. I feel that this position is self-evident, from the language used in the National Safety Appliance legislation, for there is nothing to indicate that it was intended that the language used to express the law was to be given a narrow construction in favor of railway companies. In fact the language used excludes any other idea than that the law was to apply to all locomotives, tenders, cars and similar vehicles used on any railroad, including its side tracks and appurtenances, if they were used by it in furtherance of its interstate business, even though they might likewie be used by it in

purely intra-state business. If there could have ever been any doubt that the safety appliance laws were intended to cover cars used or placed on side tracks and yard tracks, where the railroad was engaged in interstate commerce, it occurs to me that this court has officially given the statute application to such yards, side tracks, etc., as announced by this court in the case of United States vs. Erie Railroad Company, 237 U. S., 621. In that case the court held that the provisions of the safety appliance law relative to air brakes, etc., was restricted to the movement of trains, but that the provisions relative to couplers, grab-irons, etc., were of broader application and embraced switch operations as well as train movements, the court saying: "When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains, and whereby incoming trains which have completed their run are broken up. These are not train movements, but mere switching operations, and so are not within the air-brake provision. The other provisions, calling for automatic couplers and grab-irons, are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using cars."

In the case of United States vs. Chicago, Burlington & Quincy R. R., 237 U. S., 634, this court points out

the necessity for requiring all locomotives, cars, etc., to be fully equipped with the safety appliances required by the National Congress where they are used or placed upon an interstate highway, the court saying: "And not only were these trains exposed to the hazards, which that provision was intended to avoid or minimize, but unless their engineer were able readily and quickly to check or control their movements they were a serious menace to the safety of other trains which the statute was equally designed to protect."

In the case of New York Central & Hudson River R. R. vs. Carr, 237 U. S., 780, in which a person engaged as a brakeman on a train, carrying interstate freight, was injured while switching cars into a side track that carried purely intra-state freight, it was held that the work in which he was engaged, though disconnected from the interstate shipments, was a part of the handling of a train in which interstate freight was being carried, and that, therefore, he was at the time engaging in interstate commerce. Thus we see that the tendency is not to give to the legislation enacted by the National Congress, for the protection of railroad employees, a narrow or restricted meaning, but to give such legislation a common-sense interpretation and application that will nearest approach the beneficent protection intended by Congress.

The Plaintiff in Error contends that under the Texas Statute requiring it to provide suitable places for its em-

ployees to work, that it was not permitted to make repairs on the car on an open track. However, an examination of the statute (brief of Plaintiff in Error, page 18) shows that it provides that it does not apply to "points where it is necessary to make light repairs only on cars," and it is notorious that the repairs that would have saved Rigsby from having been injured were light repairs that could have been made in a few minutes.

At the very time that Defendant in Error was injured, the car from which he fell, by reason of defective safety appliances, was on a main line of an interstate highway; in fact, blocking the commerce of an interstate highway, and to show the necessity of giving that car, and to the employees using it, the protection of the safety appliance laws, let us assume that Rigsby had been ascending the car to set the brakes to hold it in position to keep it from running down the grade and possibly crashing into an interstate train, and that by reason of a grab-iron being defective, he had fallen and the car had escaped and crashed into an interstate train injuring interstate employees and passengers, would it not be manifest that the car and all the employees came within the protection of the safety appliance laws? It is likewise evident that when the car was placed upon the interstate highway to be left for some time, blocking such highway, that it was in use on an interstate highway within the meaning of the

law, and the employee injured by reason of the defects in safety appliances is entitled to recover the damages thereby sustained.

While it is quite clear to me that Rigsby comes within the protection of the safety appliance laws of the National Congress, I call attention to the fact that if he does not come within such protection, that the State of Texas has adopted similar laws which would give him a right of recovery, as shown by Section 5 of the Texas Safety Appliance Act, approved March 1, 1909, General Laws of Texas, Thirty-First Legislature, page 64, which provides:

> "That from and after the 1st of January, 1910, it shall be unlawful for any common carrier engaged in commerce as aforesaid (intrastate commerce) to use in moving intra-state traffic within said State any locomotive, tender, car or similar vehicle which is not provided with sufficient and secure grab-irons, hand-holds and foot stirrups."

And I also call attention to the fact that the defendant in error did not know of the defective condition of this car, and had no reason to know or believe that the hand-holds were defective, for the incontroverted proof shows that it was unusual for a car to be handled by switchmen with defective hand-holds, and that the switchmen had no right to expect the use of cars with defective hand-holds, but had the right to expect all such minor repairs to be made before the switchmen were required to move or han-

dle the car, and that this car had been in the yards and had been handled in connection with commercial cars and bad order cars for more than a month before the defendant in error received the injuries.

The safety appliance laws cover the character of appliances that can be easily and readily repaired, and the experience of railroad men and economists have led to the conclusion that such repairs must be made before requiring switchmen and trainmen to endanger their lives by the use of defective cars.

Regardless of the liability of the Plaintiff in Error under the safety appliance laws, (and I reiterate that it seems impossible for it to escape liability as it appears quite conclusively that the case comes clearly within the meaning of the National Safety Appliance Laws) under the common law, under the State of Facts shown in this record, the Court would have been justified in directing a verdict in favor of the Defendant in Error for the proof showed conclusively that the Plaintiff in Error was guilty of negligence in permitting this car to be used indiscriminately for a month or more in this defective condition, and each day's use endangering the life of some switchman or brakeman, and it is equally conclusive that the Defendant in Error did not assume the risk and was not guilty of contributory negligence, because as testified to by the witness all such repairs were supposed to have

been made, and under the National and State laws they should have been made before the switchmen were required to use the car.

Surely there can be no reason for withdrawing Rigsby from the protection of the safety appliance laws of the National Congress, but under any view of the case, the judgment should be affirmed, with 10 per cent damages.

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Marshall, Texas,
Attorneys for Defendant in Error.
A. R. Rigsby, Marshall, Texas.

Messenger Print *Marshall, Texas*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.
vs.
A. R. RIGSBY,
Defendant in Error.
} No. 523

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF AND ARGUMENT ON BEHALF OF THE DEFENDANT IN ERROR.

S. P. Jones,
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Attorneys for Defendant in Error.

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SUPPLEMENTAL BRIEF AND ARGUMENT ON BEHALF OF THE DEFENDANT IN ERROR.

Defendant in Error filed a motion to affirm or dismiss and brief and argument thereon. Upon consideration of said motion, the cause was placed upon the Summary Docket.

Plaintiff in Error has filed an extensive brief on the merits of the case, in which it is contended in substance that the safety appliance laws of the National Congress do not give a cause of action to employees of an interstate railway on which a car not provided with the safety appli-

ances is being used, unless the employee is, at the time of injury, by reason of such defect, engaging in interstate commerce. It also contends that the defective car from which Rigsby fell, by reason of the grab irons not being in compliance with the safety appliance laws, was not being used on an interstate highway at the time of the injury.

The plaintiff in error owned and operated a line of railroad running through Marshall, Texas, east, into the State of Louisiana. It had and operated extensive yards in the City of Marshall, used in connection with its interstate and intrastate business, and owned and operated its principal shops at Marshall where repairs were made, alike on cars engaged in interstate and intrastate commerce. The car in question had been stored on one of the tracks in said yard, and was switched therefrom on to the main line of the road where Rigsby set the brakes in the regular discharge of his duties, and attempted to leave the car when he was injured by reason of a defect in the grab irons on the car.

The plaintiff in error is what is known as a Federal or National corporation, deriving its powers from an act of the Congress of the United States entitled, "An act to incorporate the Texas & Pacific Ry. Co., and to aid in construction of its road, and other purposes," approved March 2, 1871, and an act supplementary thereto, approved March 2, 1872, the charter of which this Court will take judicial notice (Texas & Pacific Ry. Co. vs.

Cody, 166 U. S., 606) makes it a military and Post road, and empowers it to build a road that must necessarily be an interstate highway.

The yards and sidetracks of the plaintiff in error at Marshall are so intimately connected and associated with the interstate highway as to necessarily form a part thereof. The shops of the railroad at Marshall are so closely connected with the interstate highway as to reasonably be considered as a part thereof. Any movement of the car on any of the tracks in the said yard constituted a use thereof on an interstate highway within the meaning of the safety appliance laws; certainly any use or movement of the car on the main line of the road between Texas and Louisiana constituted a use thereof on an interstate highway, and it is not material whether such use or movement was for a distance of a few hundred yards or a few miles, for the protection is one of principle, and not of degree.

The testimony clearly shows that when the defendant in error was injured, the defective car was on an interstate highway. (See Tr. 20). "When I fell from the car it was on the main line of defendant's railroad. This main line runs from the passenger depot in Marshall to New Orleans, La." (See Tr. 40, bottom of page). "It was admitted that freight trains run over the main line of the defendant from Marshall, Texas, to Shreveport and New Orleans, La., a number each day, and three passenger trains each day each way." (Again Tr. 44.) "There

are three passenger trains each day each way, and four or five freight trains a day each way." (Also p. 49 Tr.) "The Marshall shops were the main repair shops for the road, both in Texas and Louisiana."

There is no merit in the contention of plaintiff in error that Congress has not the power to give to employees of an interstate highway, who are not at the time engaging in interstate commerce, a right of recovery for a failure of the Railway Company to equip the cars that are being used on the interstate highway with safety appliances, for as was inferentially stated in the first Employers' Liability case, 207 U. S., 461, and as directly stated in the case of Illinois Central Railway Company vs. Behrens, 233 U. S., 471, the nature and extent of power confided to Congress by the commerce clause of the Constitution is such that there can be no doubt that the liability of the carrier for injuries suffered by a member of a switching crew, in the course of its regular work in service on an interstate highway, is subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was interstate or intrastate.

The recent case of Great Northern Co. vs. Otis, decided by this Court on December 13, 1915, emphasizes the doctrine set forth in the safety appliance statutes, that where a car was being switched or handled for the purpose of placing it at a place necessary for repairs is handled at the sole risk of the railway company, insofar

as the employees of the railway company may be injured by such handling.

In view of the decisions of this Court it is very clear that Congress has the power to provide that all persons injured, by reason of the carrier using a car on an interstate highway not provided with the safety appliances, shall recover damages, though the employee, himself, may not have at the time been engaging in interstate commerce. It is therefore only important to consider whether the provisions of the safety appliance laws are broad enough to apply to all persons injured by reason of cars being used on an interstate highway not equipped with the safety appliance devices.

Some argument is made that the safety appliance laws do not protect any employees, except those engaged in coupling and uncoupling cars, but an examination of the laws and amendments thereto clearly shows that this is an erroneous view, for in the amendment approved April 14, 1910, it is expressly provided in Section 2 that common carriers engaged in interstate commerce shall equip its cars with secure ladders and running boards, which could, of course, have no other meaning than to protect employees engaged just as Rigsby was engaged at the time he was injured. Section 4 of said amendment provides that where the car shall become defective, and that repairs not be made at the place where it becomes defective, that it may be hauled to the nearest place where such repairs can be made without incurring the penalty;

but "such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of, or in connection with, the movement or hauling of such car with equipment which is defective or insecure, or which is not maintained in accordance with the requirements of this act, and the other acts herein referred to." The other acts referred to, we find, by an examination of Section 1 of that amendment, to be all of the safety appliance acts, beginning with 1893 down to, and including the said amendotary act, approved April 4, 1910. Each and every amendment of the original safety appliance act of 1893 contains provisions that aptly extend the provisions of Section 8 of the original act regarding remedial actions for damages in behalf of injured employees so as to protect persons injured by failure of a compliance with the respective amendments to said law. If it had not been the purpose of Section 2 of the amendment of April 14, 1910, to extend the benefits and protection to persons using the cars in other ways than for coupling and uncoupling, it would not have been at all necessary to have referred to running boards with secure grab irons to the roof of the car, and therefore, there is no merit in the contention that the beneficent effects of this legislation did not, when Rigsby was injured, extend to persons engaged in climbing to and from the top of the cars.

Under the decisions of the Supreme Court of the United States, especially the first safety appliance case, 207 U. S., 461, and the case of Illinois Central Railway Company vs. Behrens 213 U. S., 471, it is clear that the commerce clause of the constitution authorizes Congress to legislate for the protection and safety of all employees of railroads engaged in interstate commerce in such a way as to protect such employees while working on said interstate highway in a capacity that may endanger the safety of interstate traffic, though the employee at the time of the injury be not himself engaging in interstate commerce, just as Congress has power to prescribe a penalty for a carrier operating an interstate highway, permitting an intrastate car, not equipped with the safety appliances, to be in use on an interstate highway.

The amendment to the safety appliance laws, approved March 2, 1903, extends its scope and protection to all cars being used on any railroad engaged in interstate commerce, and makes the carrier liable for the penalties and, in remedial actions, for damages, just as the original act of 1893 made it liable for the penalties and in actions for damages where the defective cars were used in interstate commerce. The amendment of 1910 extended the scope thereof, by making it liable for the penalties and in damages for the use and movement of cars with defective grab irons and running boards, and permitted the cars to be moved or hauled to the nearest place for repair without the carrier incurring the penalty,

but emphatically and unconditionally placed upon the carrier the burden of paying damages sustained by an employee while such car was being used, hauled or moved on any interstate highway, regardless of whether the car was being used in interstate commerce, or whether the employee was at the time engaging in interstate commerce, or solely in intrastate commerce.

The yards and sidetracks of the plaintiff in error at Marshall, Texas, being a part of the interstate highway or system and at all times essential to its business of making up and breaking up interstate trains, any use or movement of the car upon any of the tracks in the said yard constituted a movement or use thereof upon an interstate highway or upon a railroad engaged in interstate commerce, and made the plaintiff in error liable for all injuries that were inflicted upon its employees while the said car was being moved in said defective condition, regardless of whether the car or the employee was at the time of the injury engaging in interstate commerce. Certainly, so soon as the car was placed upon the main line of the said interstate highway, and on that part of the main line of the said interstate highway between Texas and Louisiana, any use or movement of the car thereon, whether for a few hundred feet or for several miles, rendered the railway company liable for all damages that resulted from the use of the car in such defective condition.

S. P. Jones,
Bibb & Scott,
Attorneys for A. R. Rigsby, Defendant in Error.

TEXAS & PACIFIC RAILWAY COMPANY *v.* RIGSBY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 523. Argued February 21, 1916.—Decided April 17, 1916.

Disregard of the Safety Appliance Act is a wrongful act; and, where it results in damage to one of the class for whose especial benefit it was enacted, the right to recover the damages from the party in default is implied:—*ubi jus ibi remedium.*

An employee of a railroad company has a right of action against the company for damages sustained by reason of defective appliances in violation of the Safety Appliance Act even though he was engaged at the time in intrastate, and not interstate, commerce.

Congress may, in the exercise of the plenary power to regulate commerce between the States, require installation of safety appliances on cars used on highways of interstate commerce irrespective of the use made of any particular car at any particular time.

When Congress enters a field of regulation within its paramount authority, state regulation of that subject-matter is excluded; and so *held* that, without leave of Congress, a State can no more make or enforce laws inconsistent with the Federal Safety Act giving redress for injuries to workmen or travelers occasioned by absence or insecurity of such safety devices than it can prescribe the character of the appliances.

The right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured by a defect in a safety appliance required by act of Congress, has such relation to the operation of such act as a regulation of interstate commerce that it is within the constitutional grant of authority to Congress over that subject.

Although § 4 of the Safety Appliance Act of 1910 relieves the carrier from statutory penalties while a car is being hauled to the nearest available point for repairs, it does not relieve the carrier from liability in a remedial action for the death or injury of an employee caused by, or in connection with, the movement of a defectively equipped car.

Whether the defective condition of a car under the Federal Safety Appliance Act is or is not due to negligence of the carrier is immaterial, as the Act imposes an absolute and unqualified duty to maintain the appliance in secure condition; nor under § 8 of the Act of 1893 and § 5 of the Act of 1910 is an employee deemed to have assumed the risk although continuing in the employment after knowledge of the defect.

222 Fed. Rep. 221, affirmed.

THE facts, which involve the construction of the Safety Appliance Act and the validity of a verdict against the carrier, are stated in the opinion.

Mr. F. H. Prendergast for plaintiff in error:

Defendant in error received injury caused by a defective ladder on a box car while he was working as a switchman in the yard at Marshall, Texas.

He recovered under the Safety Appliance Act.

To recover he must bring himself under the Safety Appliance Act and under the Employers' Liability Act. Both the car and the man must be engaged in interstate commerce. *Ill. Cent. Ry.* v. *Behrens*, 233 U. S. 474; *Pederson* v. *Railway*, 229 U. S. 146; *Southern Ry.* v. *United States*, 222 U. S. 27.

The car was not under the Act because it had been withdrawn from all service for several weeks.

The car was not under the Safety Appliance Act because it was not being used at the time in any character of commerce, but was being taken from the railroad yard into the shops to be repaired. *Ill. Cent. Ry.* v. *Behrens*, 233 U. S. 474; Rev. Stats. Texas, 1911, Art. 6581; *Southern Ry.* v. *Snyder*, 205 Fed. Rep. 870; Safety Act, 1910, § 2.

Defendant in error was not under the protection of the Safety Appliance Act because he was not at the time engaged in interstate commerce. *Boyle* v. *Penn. Ry.*, 221

Fed. Rep. 455; *Del., Lack. & West. R. R.* v. *Yerkomis*, U. S. Sup. Court; *Howard* v. *Ill. Cent. R. R.*, 207 U. S. 490; *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 474; *Mondou* v. *N. Y. & N. H. Ry.*, 223 U. S. 51; *Pederson* v. *Del., Lack. & West. R. R.*, 229 U. S. 146.

Defendant in error was not under the protection of the Safety Appliance Act because at the time he was injured he was not coupling nor uncoupling cars. Bishop, Noncontract Law, 446; *The Eugene F. Moran*, 212 U. S. 472; *Howard* v. *Ill. Cent. R. R.*, 207 U. S. 490; *Mondou* v. *N. Y. & N. H. Ry.*, 223 U. S. 51; Potter's Dwarris Stat. 128, 140; Sherman & Redfield on Negligence, § 8; Safety Appliance Act, 1893, § 4; *Williams* v. *Chicago & Alton R. R.*, 135 Illinois, 491.

There was no common-law negligence giving defendant in error a right to recover damages. *Flanagan* v. *C. & N. W. Ry.*, 45 Wisconsin, 98; *S. C.*, 50 Wisconsin, 462; *Watson* v. *H. & T. C. Ry.*, 58 Texas, 439.

Mr. S. P. Jones for defendant in error:

Car from which defendant in error fell was in use on an interstate highway, and the injury was caused by a defective safety appliance. *Delk* v. *St. L. & S. F. Ry.*, 220 U. S. 580; *N. C. & H. R. Ry.* v. *Carr*, 238 U. S. 260; *Johnson* v. *Sou. Pac. Ry.*, 196 U. S. 13; *Southern Ry.* v. *United States*, 222 U. S. 23.

The Safety Appliance Law gives a cause of action to employees injured by defects while car is in use on an interstate highway, though the employee is not engaged at the time in interstate commerce. *Southern Ry.* v. *United States*, 222 U. S. 23; *United States* v. *C., B. & Q. Ry.*, 237 U. S. 410; *United States* v. *Erie Ry.*, 237 U. S. 402.

Under Texas Safety Appliance Laws, or independent of safety appliance laws, the defendant in error was entitled to an instructed verdict. Texas Safety App. Laws, Gen. Laws, 1909, p. 64.

MR. JUSTICE PITNEY delivered the opinion of the court.

The defendant in error, Rigsby, while in the employ of plaintiff in error as a switchman in its yard at Marshall, Texas, was engaged, with others of the yard crew, in taking some "bad order" cars to the shops there to be repaired. The switch engine and crew went upon a spur track, hauled out three cars, and switched them upon the main line, intending to go back upon the spur track for others, to be taken with the three to the shops, which were on the opposite side of the main line from the spur track. Rigsby, in the course of his duties, rode upon the top of one of the cars (a box car) in order to set the brakes and stop them and hold them upon the main line. He did this, and while descending from the car to return to the spur track he fell, owing to a defect in one of the handholds or grab-irons that formed the rungs of the ladder, and sustained personal injuries. This car had been out of service and waiting on the track spur for some days, perhaps a month. The occurrence took place September 4, 1912. In an action for damages, based upon the Federal Safety Appliance Acts,[1] the above facts appeared without dispute, and it was admitted that the main line of defendant's railroad was in daily use for the passage of freight and passenger trains in interstate commerce. The trial court instructed the jury, as matter of law, that they should return a verdict in favor of plaintiff, the only question submitted to them being the amount of the damages. The Railway Company excepted to this charge, and requested certain specific instructions based upon the theory that the car was out of service and marked "bad order," which was notice to Rigsby of its condition; that there was no evidence that the condition of the car had resulted from any

[1] Act of March 2, 1893, c. 196; 27 Stat. 531; amendatory act of March 2, 1903, c. 976; 32 Stat. 943; supplementary act of April 14, 1910, c. 160; 36 Stat. 298.

negligence of defendant; that it was at the time being taken to the shop for repairs; and that for these reasons plaintiff could not recover. The instructions were refused, and exceptions taken. The resulting judgment was affirmed by the Circuit Court of Appeals. 222 Fed. Rep. 221.

It is insisted that Rigsby was not within the protection of the Act because he was not coupling or uncoupling cars at the time he was injured. The reference is to § 4 of the act of March 2, 1893, which requires "secure grab-irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." This action was not based upon that provision, however, but upon § 2 of the amendment of 1910, which declares: "All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders." There can be no question that a box car having a handbrake operated from the roof requires also a secure ladder to enable the employee to safely ascend and descend, and that the provision quoted was intended for the especial protection of employees engaged in duties such as that which plaintiff was performing.

It is earnestly insisted that Rigsby was not under the protection of the Safety Appliance Acts because at the time he was injured he was not engaged in interstate commerce. By § 1 of the 1903 amendment its provisions and requirements and those of the act of 1893 were made to apply "to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce . . . and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith," subject to an exception not now pertinent. And by § 5 of the 1910 amendment the provisions of the previous acts

were made to apply to that act, with a qualification that does not affect the present case. In *Southern Ry* v. *United States*, 222 U. S. 20, which was an action to recover penalties for a violation of the Acts with respect to cars some of which were moved in intrastate traffic and not in connection with any car or cars used in interstate commerce, but upon a railroad which was a part of a through highway for interstate traffic, it was held that the 1903 amendment enlarged the scope of the original Act so as to embrace all cars used on any railway that is a highway of interstate commerce, whether the particular cars are at the time employed in such commerce or not. The question whether the legislation as thus construed was within the power of Congress under the commerce clause, was answered in the affirmative, the court saying (p. 27): "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employees, for they usually, if not necessarily, have to do with both classes of traffic. Besides, the several trains on the same railroad are not independent in point of movement and safety, but are inter-dependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And so the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others."

It is argued that the authority of that case goes no further than to sustain the penal provisions of the Act,

and does not uphold a right of action by an employee injured through a violation of its provisions, unless he was engaged in interstate commerce. That the scope of the legislation is broad enough to include all employees thus injured, irrespective of the character of the commerce in which they are engaged, is plain. The title of the Act, repeated in that of each supplement, is general: "An act to promote the safety of employees and travelers," etc.; and in the proviso to § 4 of the supplement of 1910 there is a reservation as to "liability in any remedial action for the death or injury of any railroad employee." None of the Acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act, has never been doubted. (See *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo, Rochester &c. Ry.*, 205 U. S. 1, 8; 220 U. S. 590, 592; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 284, 295; *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580; *Cleveland &c. Ry.* v. *Baker*, 91 Fed. Rep. 224; *Denver & R. G. R. R.* v. *Arrighi*, 129 Fed. Rep. 347; *Chicago &c. Ry.* v. *Voelker*, 129 Fed. Rep. 522; *Chicago Junction Ry.* v. *King*, 169 Fed. Rep. 372.) A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig., *tit.* Action upon Statute (F), in these words: "So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." (*Per* Holt, C. J., *Anon.*, 6 Mod. 26, 27.) This is but an application of the maxim,

Ubi jus ibi remedium. See 3 Black. Com. 51, 123; *Couch* v. *Steel*, 3 El. & Bl. 402, 411; 23 L. J. Q. B. 121, 125. The inference of a private right of action in the present instance is rendered irresistible by the provision of § 8 of the Act of 1893 that an employee injured by any car, etc., in use contrary to the act shall not be deemed to have assumed the risk, and by the language above cited from the proviso in § 4 of the 1910 act.

Plaintiff's injury was directly attributable to a defect in an appliance which by the 1910 amendment was required to be secure, and the Act must therefore be deemed to create a liability in his favor, unless it be beyond the power of Congress under the commerce clause of the Constitution to create such a liability in favor of one not employed in interstate commerce. In *Ill. Cent. R. R.* v. *Behrens*, 233 U. S. 473, 477, the court said, *arguendo*, with reference to this topic: "Considering the status of the railroad as a highway for both interstate and intrastate commerce, the interdependence of the two classes of traffic in point of movement and safety, the practical difficulty in separating or dividing the general work of the switching crew, and the nature and extent of the power confided to Congress by the commerce clause of the Constitution, we entertain no doubt that the liability of the carrier for injuries suffered by a member of the crew in the course of its general work was subject to regulation by Congress, whether the particular service being performed at the time of the injury, isolatedly considered, was in interstate or intrastate commerce." Judicial expressions in previous cases were referred to, and the decision in *Employers' Liability Cases*, 207 U. S. 463, was distinguished because the act of June 11, 1906, there pronounced invalid, attempted to regulate the liability of every carrier in interstate commerce for any injury to any employee, even though his employment had no relation whatever to interstate commerce.

The doing of plaintiff's work, and his security while doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce; for a failure to set the brakes so as temporarily to hold the "bad order" cars in place on that track would have been obviously dangerous to through traffic; while an injury to the brakeman had a tendency to cause delay in clearing the main line for such traffic. Perhaps upon the mere ground of the relation of his work to the immediate safety of the main track plaintiff's right of action might be sustained.

But we are unwilling to place the decision upon so narrow a ground, because we are convinced that there is no constitutional obstacle in the way of giving to the Act in its remedial aspect as broad an application as was accorded to its penal provisions in *Southern Railway* v. *United States, supra.* In addition to what has been quoted from the opinions in that case and the *Behrens Case*, the following considerations are pertinent. In the exercise of its plenary power to regulate commerce between the States, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded. *Southern Ry.* v. *R. R. Comm., Indiana*, 236 U. S. 439. Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the States to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the conse-

quences that shall follow a breach of the law are vital and integral to its effect as a regulation of conduct, liability to private suit is or may be as potent a deterrent as liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. Hence, while it may be conceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the States, is a matter within the control of Congress; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce—a discrimination certainly not required by anything in the Constitution—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several States, with probable differences in the law material to its effect as regulatory of the conduct of the carrier. We are therefore brought to the conclusion that the right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the Act as a regulation of commerce between the States that it is within the constitutional grant of authority over that subject.

It is argued that the statute does not apply except where the car is in use in transportation at the time of the injury to the employee, and that since it does not appear that the car in question was in bad order because of any negligence on the part of the railway company,

and it was being taken to the shop for repairs at the time of the accident, there is no liability for injuries to an employee who had notice of its bad condition and was engaged in the very duty of taking it to the shop. This is sufficiently answered by our recent decision in *Great Northern Ry.* v. *Otos*, 239 U. S. 349, 351, where it was pointed out that although § 4 of the act of 1910 relieves the carrier from the statutory penalties while a car is being hauled to the nearest available point for repairs, it expressly provides that it shall not be construed to relieve a carrier from liability in a remedial action for the death or injury of an employee caused by or in connection with the movement of a car with defective equipment. The question whether the defective condition of the ladder was due to defendant's negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition. *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, 294, 295; *Chicago, B. & Q. Ry.* v. *United States*, 220 U. S. 559, 575; *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580, 586.

Of course, the employee's knowledge of the defect does not bar his suit, for by § 8 of the Act of 1893 an employee injured by any car in use contrary to the provisions of the act is not to be deemed to have assumed the risk, although continuing in the employment of the carrier after the unlawful use of the car has been brought to his knowledge; and by § 5 of the Act of 1910 the provisions of the 1893 act are made applicable to it, with a qualification that does not affect remedial actions by employees.

The Circuit Court of Appeals correctly disposed of the case, and its judgment is

Affirmed.